

GUILFORD COLLEGE, *et al.*
 Plaintiffs,
 v.
 KEVIN MCALEENAN, in his
 official capacity as Secretary of
 Homeland Security, *et al.*,
 Defendants.

Civil Action No. 1:18-cv-0891

Document Number	Document Title	Beginning Bates Number	Ending Bates Number
1	Presidential Memorandum for the Secretary of State, the Attorney General, the Secretary of Homeland Security, dated March 6, 2017.	GC CAR 000001	GC CAR 000005
2	USCIS Interoffice Memorandum “Accrual of Unlawful Presence and F, J, and M Nonimmigrants,” issued on May 10, 2018.	GC CAR 000006	GC CAR 000018
3	USCIS Interoffice Memorandum “Accrual of Unlawful Presence and F, J, and M Nonimmigrants,” issued on August 9, 2018.	GC CAR 000019	GC CAR 000031

4	AFM Chapter 40.9.2, “Consolidation of Guidance Concerning Unlawful Presence for Purposes of Subsections 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I) of the Act,” issued on May 6, 2009, to F, J, and M nonimmigrants.	GC CAR 000032	GC CAR 000082
5	<i>United States v. Rehaif</i> , 888 F.3d 1138 (11th Cir. 2018).	GC CAR 000083	GC CAR 000091
6	<i>United States v. Atandi</i> , 376 F.3d 1186 (10th Cir. 2004).	GC CAR 000092	GC CAR 000098
7	<i>United States v. Bazargan</i> , 992 F.2d 844 (8th Cir. 1993).	GC CAR 000098	GC CAR 000104
8	<i>United States v. Igbatayo</i> , 764 F.2d 1039 (5th Cir. 1985) (per curiam).	GC CAR 000105	GC CAR 000106
9	Fiscal Year 2016 Entry/Exit Overstay Report, Department of Homeland Security.	GC CAR 000107	GC CAR 000156
10	Fiscal Year 2017 Entry/Exit Overstay Report, Department of Homeland Security.	GC CAR 000157	GC CAR 000206
11	<i>Matter of Chawathe</i> , 25 I&N Dec. 369 (AAO 2010).	GC CAR 000207	GC CAR 000212

12	Stakeholder comments matrix, Accrual of Unlawful Presence and F, J, and M nonimmigrants, received May 10, 2018 - June 11, 2018	GC CAR 000213	GC CAR 000556
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12.56	Attached comment letter from Jeanne E. Kelley, Boston University	GC CAR 000751	GC CAR 000753
12.57	Justin Storch on behalf of Counsel for Global Immigration and Society for Human Resource Management	GC CAR 000754	GC CAR 000757
12.58	Attached comment letter from Susan C. Ellison, Dartmouth College	GC CAR 000758	GC CAR 000759

I, Mark Phillips, certify that the documents contained in this Certified Administrative Record guided the policy decisions in the USCIS Interoffice Memorandum "Accrual of Unlawful Presence and F, J, and M Nonimmigrants," issued on August 9, 2018.

R M PHILLIPS Digitally signed by R M PHILLIPS
Date: 2019.05.09 13:15:10 -04'00'

Mark Phillips
Chief, Residence and Naturalization Division
Office of Policy and Strategy

5/9/2019
Date



PRESIDENTIAL MEMORANDA

**Memorandum for the Secretary of State, the Attorney General,
the Secretary of Homeland Security**

IMMIGRATION

Issued on: March 6, 2017



SUBJECT: Implementing Immediate Heightened Screening and Vetting of Applications for Visas and Other Immigration Benefits, Ensuring Enforcement of All Laws for Entry into the United States, and Increasing Transparency among Departments and Agencies of the Federal Government and for the American People

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the Immigration and Nationality Act (INA), 8 U.S.C. 1101 et seq., and section 301 of title 3, United States Code, I hereby direct the following:

Section 1. Policy. It is the policy of the United States to keep its citizens safe from terrorist attacks, including those committed by foreign nationals. To avert the entry into the United States of foreign nationals who may aid, support, or commit violent, criminal, or terrorist acts, it is critical that the executive branch enhance the screening and vetting protocols and procedures for granting visas, admission to the United States, or other benefits under the INA. For that reason, in the executive order entitled, “Protecting the Nation from Foreign Terrorist Entry into the United States,” and issued today, I directed the Secretary of Homeland Security, in consultation with the Secretary of State and the Director of National Intelligence, to conduct a review to “identify whether, and if so what, additional information will be needed from each foreign country to adjudicate an

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application by a national of that country for a visa, admission, or other benefit under the INA (adjudications) in order to determine that the individual is not a security or public-safety threat.”

While that comprehensive review is ongoing, however, this Nation cannot delay the immediate implementation of additional heightened screening and vetting protocols and procedures for issuing visas to ensure that we strengthen the safety and security of our country.

Moreover, because it is my constitutional duty to “take Care that the Laws be faithfully executed,” the executive branch is committed to ensuring that all laws related to entry into the United States are enforced rigorously and consistently.

Sec. 2. Enhanced Vetting Protocols and Procedures for Visas and Other Immigration Benefits. The Secretary of State and the Secretary of Homeland Security, in consultation with the Attorney General, shall, as permitted by law, implement protocols and procedures as soon as practicable that in their judgment will enhance the screening and vetting of applications for visas and all other immigration benefits, so as to increase the safety and security of the American people. These additional protocols and procedures should focus on:

(a) preventing the entry into the United States of foreign nationals who may aid, support, or commit violent, criminal, or terrorist acts; and

(b) ensuring the proper collection of all information necessary to rigorously evaluate all grounds of inadmissibility or deportability, or grounds for the denial of other immigration benefits.

Sec. 3. Enforcement of All Laws for Entry into the United States. I direct the Secretary of State, the Attorney General, the Secretary of Homeland Security, and the heads of all other relevant executive departments and agencies (as identified by the Secretary of Homeland Security) to rigorously enforce all existing grounds of inadmissibility and to

ensure subsequent compliance with related laws after admission. The heads of all relevant executive departments and agencies shall issue new rules, regulations, or guidance (collectively, rules), as appropriate, to enforce laws relating to such grounds of inadmissibility and subsequent compliance. To the extent that the Secretary of Homeland Security issues such new rules, the heads of all other relevant executive departments and agencies shall, as necessary and appropriate, issue new rules that conform to them. Such new rules shall supersede any previous rules to the extent of any conflict.

Sec. 4. Transparency and Data Collection. (a) To ensure that the American people have more regular access to information, and to ensure that the executive branch shares information among its departments and agencies, the Secretary of State and Secretary of Homeland Security shall, consistent with applicable law and national security, issue regular reports regarding visas and adjustments of immigration status, written in non-technical language for broad public use and understanding. In addition to any other information released by the Secretary of State, the Attorney General, or the Secretary of Homeland Security:

(i) Beginning on April 28, 2017, and by the last day of every month thereafter, the Secretary of State shall publish the following information about actions taken during the preceding calendar month:

(A) the number of visas that have been issued from each consular office within each country during the reporting period, disaggregated by detailed visa category and country of issuance; and

(B) any other information the Secretary of State considers appropriate, including information that the Attorney General or Secretary of Homeland Security may request be published.

(ii) The Secretary of Homeland Security shall issue reports detailing the number of adjustments of immigration status that have been made during the reporting

period, disaggregated by type of adjustment, type and detailed class of admission, and country of nationality. The first report shall be issued within 90 days of the date of this memorandum, and subsequent reports shall be issued every 90 days thereafter. The first report shall address data from the date of this memorandum until the report is issued, and each subsequent report shall address new data since the last report was issued.

(b) To further ensure transparency for the American people regarding the efficiency and effectiveness of our immigration programs in serving the national interest, the Secretary of State, in consultation with the Secretary of Health and Human Services, the Secretary of Homeland Security, and the Director of the Office of Management and Budget, shall, within 180 days of the date of this memorandum, submit to me a report detailing the estimated long-term costs of the United States Refugee Admissions Program at the Federal, State, and local levels, along with recommendations about how to curtail those costs.

(c) The Secretary of State, in consultation with the Director of the Office of Management and Budget, shall, within 180 days of the date of this memorandum, produce a report estimating how many refugees are being supported in countries of first asylum (near their home countries) for the same long-term cost as supporting refugees in the United States, taking into account the full lifetime cost of Federal, State, and local benefits, and the comparable cost of providing similar benefits elsewhere.

Sec. 5. General Provisions. (a) Nothing in this memorandum shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This memorandum shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) All actions taken pursuant to this memorandum shall be consistent with requirements and authorities to protect intelligence and law enforcement sources and methods, personally identifiable information, and the confidentiality of visa records. Nothing in this memorandum shall be interpreted to supersede measures established under authority of law to protect the security and integrity of specific activities and associations that are in direct support of intelligence and law enforcement operations.

(d) This memorandum is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

(e) The Secretary of State is hereby authorized and directed to publish this memorandum in the Federal Register.

DONALD J. TRUMP

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August 9, 2018

PM-602-1060.1

Policy Memorandum

SUBJECT: Accrual of Unlawful Presence and F, J, and M Nonimmigrants

Purpose

This Policy Memorandum (PM) provides guidance to U.S. Citizenship and Immigration Services (USCIS) officers and assists USCIS officers in the calculation of unlawful presence of those in student (F nonimmigrant), exchange visitor (J nonimmigrant), or vocational student (M nonimmigrant) status and their dependents while in the United States. The PM also revises previous policy guidance in the USCIS Adjudicator's Field Manual (AFM) relating to this issue.

Authority

- INA 212(a)(9)(B)
- INA 212(a)(9)(C)

Background

Since the creation of the U.S. Department of Homeland Security (DHS), USCIS has followed the former Immigration and Naturalization Service's (INS) various policies on the accrual of unlawful presence. In 2009, USCIS consolidated its prior policy guidance in AFM Chapter 40.9.2.¹

According to that policy—to be superseded by this policy memorandum—foreign students and exchange visitors (F and J nonimmigrants, respectively) who were admitted for, or present in the United States in, duration of status (D/S) started accruing unlawful presence on the day after USCIS formally found a nonimmigrant status violation while adjudicating a request for another immigration benefit or on the day after an immigration judge ordered the applicant excluded, deported, or removed (whether or not the decision is appealed), whichever came first. F and J nonimmigrants, and foreign vocational students (M nonimmigrants), who were admitted until a specific date (date certain) accrued unlawful presence on the day after their Form I-94 expired, on the day after USCIS formally found a nonimmigrant status violation while adjudicating a request for another immigration benefit, or on the day after an immigration judge ordered the

¹ See USCIS Interoffice Memorandum, "Consolidation of Guidance Concerning Unlawful Presence for Purposes of Sections 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I) of the Act" (May 6, 2009).

applicant excluded, deported, or removed (whether or not the decision was appealed), whichever came first.²

The former INS policy, as consolidated in the AFM, went into effect in 1997, prior to the creation of some of the technologies and systems currently used by DHS to monitor nonimmigrants who are admitted to the United States in or otherwise acquire F, J, or M nonimmigrant status. Over the years, DHS also has made significant progress in its ability to identify and calculate the number of nonimmigrants who have failed to maintain status, including certain F, J, and M nonimmigrants.³

For example, since the creation of the policy, the Student and Exchange Visitor Information System (SEVIS)—the DHS system used to monitor F, J, and M nonimmigrants—has provided USCIS officers additional information about an alien’s immigration history, including information that indicates that an alien in F, J, or M nonimmigrant status may have completed or ceased to pursue his or her course of study or activity, as outlined in Form I-20, Certificate of Eligibility for Nonimmigrant Student Status, and related forms, or Form DS-2019, Certificate of Eligibility for Exchange Visitor (J-1) Status. For FY 2016, DHS calculated that a total of 1,457,556 aliens admitted in F, J, and M nonimmigrant status were either expected to change status or depart the United States. Of this population, it was estimated that the total overstay rate was 6.19 percent for F nonimmigrants, 3.80 percent for J nonimmigrants, and 11.60 percent for M nonimmigrants.⁴⁵

² Under the former policy, an alien admitted for duration of status who overstayed or violated such status did not immediately begin accruing a period of unlawful presence for purposes of INA 212(a)(9)(B). Nevertheless, such alien was illegally present in the United States and would be amenable to removal proceedings under INA 237(a)(1)(C), which renders deportable aliens who violate their nonimmigrant status or any condition of their entry. Moreover, such aliens could be charged and ultimately convicted of any criminal offense requiring the alien to be illegally or unlawfully present in the United States as an element of the offense. For example, aliens who were admitted for duration of status and either violated or overstayed such status were treated as being illegally or unlawfully present in the United States for purposes of criminal culpability under the firearms provisions at 18 U.S.C. §§ 922(a)(6) and 922(g)(5). See *United States v. Rehaif*, 888 F.3d 1138 (11th Cir. 2018) (holding that a student who was academically dismissed, failed to depart the United States immediately, and therefore violated the terms of his F-1 status was unlawfully present for purposes of 18 U.S.C. § 922(g)(5)(A)); *United States v. Atandi*, 376 F.3d 1186, 1188 (10th Cir. 2004) (“Rather, we hold that an alien who is only permitted to remain in the United States for the duration of his or her status (as a student, for example) becomes ‘illegally or unlawfully in the United States’ for purposes of § 922(g)(5)(A) upon commission of a status violation.”); *United States v. Bazargan*, 992 F.2d 844, 847 (8th Cir. 1993) (“A nonimmigrant alien F-1 student becomes an illegal alien subject to deportation by failing to comply with the transfer procedures set forth in the INS regulations.”); *United States v. Igbatayo*, 764 F.2d 1039, 1040 (5th Cir. 1985) (per curiam) (“After failing to maintain the student status required by his visa, Igbatayo was without authorization to remain in this country.”).

³ See Fiscal Year 2016 Entry/Exit Overstay Report, Department of Homeland Security, available at <https://www.dhs.gov/publication/entryexit-overstay-report>.

⁴ See Fiscal Year 2016 Entry/Exit Overstay Report, Department of Homeland Security, page 12, available at <https://www.dhs.gov/publication/entryexit-overstay-report>.

⁵ On August 7, 2018, DHS issued the Fiscal Year 2017 Entry/Exit Overstay Report as this memorandum was being finalized for publication. For FY2017, DHS calculated that a total of 1,662,369 aliens admitted in F, J, and M nonimmigrant status were expected either to change status or depart the United States, and estimated that the total overstay rate was 4.07 percent for F nonimmigrants, 4.17 percent for J nonimmigrants, and 9.54 percent for M nonimmigrants. These figures continue to be significantly higher than those for other nonimmigrant categories. See Fiscal Year 2017 Entry/Exit Overstay Report, Department of Homeland Security, page 11, available at

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To reduce the number of overstays and to improve how USCIS implements the unlawful presence ground of inadmissibility under INA 212(a)(9)(B) and INA 212(a)(9)(C)(i)(I), USCIS is now changing its policy on how to calculate unlawful presence for F-1, J-1, and M-1 nonimmigrants, and their dependents (F-2, J-2, and M-2).

Effective Date

This new guidance on the accrual of unlawful presence with respect to F, J, and M nonimmigrants will take effect on August 9, 2018. The policy for determining unlawful presence for aliens present in the United States who are not in F, J, or M nonimmigrant status remains unchanged.

This guidance supersedes any prior guidance on this topic, including in its entirety the May 10, 2018 PM titled “Unlawful Presence and F, J, and M Nonimmigrants.”

Policy

The new policy clarifies that F, J, and M nonimmigrants, and their dependents, admitted or otherwise authorized to be present in the United States in duration of status (D/S) or admitted until a specific date (date certain), start accruing unlawful presence as outlined below.⁶

F, J, or M nonimmigrants who failed to maintain nonimmigrant status before August 9, 2018.

F, J, or M nonimmigrants who failed to maintain their nonimmigrant status⁷ before August 9, 2018 start accruing unlawful presence based on that failure on August 9, 2018,⁸ unless the alien had already started accruing unlawful presence on the earliest of the following:

<https://www.dhs.gov/publication/fiscal-year-2017-entryexit-overstay-report>. Accordingly, USCIS believes that the data presented in the FY2017 report continues to support this policy change.

⁶ Unless the nonimmigrant is otherwise protected from accruing unlawful presence, as outlined in AFM Chapter 40.9.2.

⁷ The day the alien failed to maintain status may be determined by a DHS officer. For example, an F, J, or M nonimmigrant may fail to maintain status if he or she no longer is pursuing the course of study or the authorized activity before completing his or her course of study or program, or engages in an unauthorized activity. An F, J, or M nonimmigrant also may fail to maintain his or her status if the alien remains in the United States after having completed the course of study or program (including any authorized practical training plus any authorized grace period, as outlined in 8 CFR 214.2). Additionally, an F, J, or M nonimmigrant who is admitted for a date certain on his or her Form I-94, Arrival/Departure Record and remains in the United States beyond that date may fail to maintain his or her status. In accordance with 8 CFR 103.2(b)(16), if an adverse decision will result from a DHS officer’s inadmissibility determination under INA 212(a)(9)(B) or INA 212(a)(9)(C)(i)(I), and that determination is based on derogatory information of which the alien is unaware, the officer generally will give the alien an opportunity to rebut that derogatory information.

⁸ An F, J, or M nonimmigrant who failed to maintain status before the effective date of this memorandum and remains in the United States without maintaining lawful status is generally present in violation of U.S. immigration laws. Nevertheless, if DHS makes the inadmissibility determination under INA 212(a)(9)(B) or INA 212(a)(9)(C)(i)(I) on or after August 9, 2018, unlawful presence for such an alien begins accruing on August 9, 2018 and may continue to accrue for as long as the alien remains in unlawful status in the United States, unless the alien is or becomes otherwise protected from accruing unlawful presence, as outlined in this AFM Chapter 40.9.2.

- The day after DHS denied the request for an immigration benefit, if DHS made a formal finding that the alien violated his or her nonimmigrant status while adjudicating a request for another immigration benefit;⁹
- The day after the Form I-94, Arrival/Departure Record, expired, if the F, J, or M nonimmigrant was admitted for a date certain; or
- The day after an immigration judge ordered the alien excluded, deported, or removed (whether or not the decision is appealed).

F, J, or M nonimmigrants who failed to maintain nonimmigrant status on or after August 9, 2018

An F, J, or M nonimmigrant begins accruing unlawful presence, due to a failure to maintain his or her status¹⁰ **on or after** August 9, 2018, on the earliest of any of the following:

- The day after the F, J, or M nonimmigrant no longer pursues the course of study or the authorized activity, or the day after he or she engages in an unauthorized activity;
- The day after completing the course of study or program (including any authorized practical training plus any authorized grace period, as outlined in 8 CFR 214.2);
- The day after the Form I-94 expires, if the F, J, or M nonimmigrant was admitted for a date certain; or
- The day after an immigration judge orders the alien excluded, deported, or removed (whether or not the decision is appealed).

When assessing whether an F, J, or M nonimmigrant accrued unlawful presence and was no longer in a period of stay authorized, the USCIS officer should consider information relating to the alien's immigration history, including but not limited to:

- Information contained in the systems available to USCIS;
- Information contained in the alien's record;¹¹ and

⁹ Note that the policy for determining when unlawful presence begins to accrue remains unchanged for F, J, and M nonimmigrants for whom DHS made a formal finding of violation of nonimmigrant status before August 9, 2018.

¹⁰ The day the alien failed to maintain his or her status may be determined by a DHS officer. In accordance with 8 CFR 103.2(b)(16), if an adverse decision will result from a DHS officer's inadmissibility determination under INA 212(a)(9)(B) or INA 212(a)(9)(C)(i)(I) and that determination is based on derogatory information of which the alien is unaware, the officer, shall give the alien an opportunity to rebut that derogatory information.

¹¹ This includes the alien's admissions regarding his or her immigration history or other information discovered during the adjudication.

- Information obtained through a Request for Evidence (RFE) or Notice of Intent to Deny (NOID), if any. The officer should follow current USCIS guidance on the issuance of RFEs or NOIDs.¹²

The period of stay authorized for an F-2, J-2, or M-2 nonimmigrant dependent (spouse or child) admitted for D/S or for a date certain is contingent on the F-1, J-1, or M-1 nonimmigrant remaining in a period of stay authorized. An F-2, J-2, or M-2 nonimmigrant's period of stay authorized ends when the F-1, J-1, or M-1 nonimmigrant's period of stay authorized ends. In addition, an F-2, J-2, or M-2 nonimmigrant's period of stay authorized may end due to the F-2, J-2, or M-2 nonimmigrant dependent's own conduct or circumstances.

This new guidance on the accrual of unlawful presence with respect to F, J, and M nonimmigrants will take effect on August 9, 2018. The policy for determining unlawful presence for aliens present in the United States who are not in F, J, or M nonimmigrant status remains unchanged.

This guidance supersedes any prior guidance on this topic.

Implementation

Chapter 40.9.2 of the AFM is revised by:

- Adding "Other than F, J, or M Nonimmigrants" to the heading of section 40.9.2(b)(1)(E)(i);
- Adding "Other Than F or J Nonimmigrants" to the heading of section 40.9.2(b)(1)(E)(ii);
- Creating a new section 40.9.2(b)(1)(E)(iii);
- Redesignating current section 40.9.2(b)(1)(E)(iii) as section 40.9.2(b)(1)(E)(iv) and amending the text; and
- Revising the text of section 40.9.2(b)(3)(D).

These revised AFM Chapter 40.9.2 sections, as amended, read as follows:

* * *

(b) Determining When an Alien Accrues Unlawful Presence

* * *

(1) Aliens Present in Lawful Status or as Parolees

¹² The USCIS assessment is made under the preponderance of the evidence standard. See *Matter of Chawathe*, 25 I&N Dec. 369, 375-376 (AAO 2010).

* * *

(E) Lawful Nonimmigrants

The period of stay authorized for a nonimmigrant may end on a specific date or may continue for “duration of status (D/S).” Under current USCIS policy, nonimmigrants begin to accrue unlawful presence as follows:

(i) Nonimmigrants Admitted Until a Specific Date (Date Certain) Other Than F, J, or M Nonimmigrants

* * *

(ii) Nonimmigrants Admitted for Duration of Status (D/S) Other Than F or J Nonimmigrants

* * *

(iii) F or J Nonimmigrants Admitted for Duration of Status (D/S) or F, J, or M Nonimmigrants Admitted Until a Specific Date (Date Certain)

Background

Since the creation of the U.S. Department of Homeland Security (DHS), USCIS has followed the former Immigration and Naturalization Service’s (INS) various policies on the accrual of unlawful presence. In 2009, USCIS consolidated its prior policy guidance in this AFM chapter.¹³

According to that policy—now superseded by this guidance—foreign students and exchange visitors (F and J nonimmigrants, respectively) admitted for, or present in the United States in, duration of status (D/S) started accruing unlawful presence on the day after USCIS formally found a nonimmigrant status violation while adjudicating a request for another immigration benefit or on the day after an immigration judge ordered the applicant excluded, deported, or removed (whether or not the decision is appealed), whichever came first. F and J nonimmigrants, and foreign vocational students (M nonimmigrants), admitted until a specific date (date certain) accrued unlawful presence on the day after their Form I-94 expired, or on the day after USCIS formally found a nonimmigrant status violation while adjudicating a request for another immigration benefit, or on the day after an immigration judge ordered the applicant excluded, deported, or removed (whether or not the decision was appealed), whichever came

¹³ See USCIS Interoffice Memorandum, “Consolidation of Guidance Concerning Unlawful Presence for Purposes of Sections 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I) of the Act” (May 6, 2009).

first.¹⁴

The former INS policy, as consolidated in the AFM, went into effect in 1997 prior to the creation of some of the technologies and systems currently used by DHS to monitor nonimmigrants who are admitted to the United States in or otherwise acquire F, J, or M nonimmigrant status. Over the years, DHS has also made significant progress in its ability to identify and calculate the number of nonimmigrants who have failed to maintain status, including certain F, J, or M nonimmigrants.¹⁵

For example, since the creation of the policy, the Student and Exchange Visitor Information System (SEVIS)—the DHS system used to monitor F, J, and M nonimmigrants—has provided USCIS officers additional information about an alien's immigration history, including information that indicates that an alien in F, J, or M nonimmigrant status may have completed or ceased to pursue his or her course of study or activity, as outlined in Form I-20, Certificate of Eligibility for Nonimmigrant Student Status, and related forms, or Form DS-2019, Certificate of Eligibility for Exchange Visitor (J-1) Status. For FY 2016, DHS calculated that a total of 1,457,556 aliens admitted in F, J, and M nonimmigrant status were either expected to change status or depart the United States. Of this population, it was estimated that the total overstay rate was 6.19 percent for F nonimmigrants, 3.80 percent for J nonimmigrants, and 11.60 percent for M nonimmigrants.¹⁶

To reduce the number of overstays and to improve how USCIS implements the unlawful presence ground of inadmissibility under INA 212(a)(9)(B) and INA 212(a)(9)(C)(i)(I), USCIS changed its policy on how to calculate unlawful presence for F-1, J-1, and M-1 nonimmigrants, and their dependents (F-2, J-2, and M-2) effective on August 9, 2018.

¹⁴ Under the former policy, an alien admitted for duration of status who overstayed or violated such status did not immediately begin accruing unlawful presence for purposes of INA 212(a)(9)(B). Nevertheless, such alien was illegally present in the United States and would be amenable to removal proceedings under INA 237(a)(1)(C), which renders deportable aliens who violate their nonimmigrant status or any condition of their entry. Moreover, such aliens could be charged and ultimately convicted of any criminal offense requiring the alien to be illegally or unlawfully present in the United States as an element of the offense. For example, aliens who were admitted for duration of status and either violated or overstayed such status were treated as being illegally or unlawfully present in the United States for purposes of criminal culpability under the firearms provisions at 18 U.S.C. §§ 922(a)(6) and 922(g)(5). See *United States v. Rehaif*, 888 F.3d 1138 (11th Cir. 2018) (holding that a student who was academically dismissed, failed to depart the United States immediately, and therefore violated the terms of his F-1 status was unlawfully present for purposes of 18 U.S.C. § 922(g)(5)(A)); *United States v. Atandi*, 376 F.3d 1186, 1188 (10th Cir. 2004) (“Rather, we hold that an alien who is only permitted to remain in the United States for the duration of his or her status (as a student, for example) becomes ‘illegally or unlawfully in the United States’ for purposes of § 922(g)(5)(A) upon commission of a status violation.”); *United States v. Bazargan*, 992 F.2d 844, 847 (8th Cir. 1993) (“A nonimmigrant alien F-1 student becomes an illegal alien subject to deportation by failing to comply with the transfer procedures set forth in the INS regulations.”); *United States v. Igbatayo*, 764 F.2d 1039, 1040 (5th Cir. 1985) (per curiam) (“After failing to maintain the student status required by his visa, Igbatayo was without authorization to remain in this country.”).

¹⁵ See Fiscal Year 2016 Entry/Exit Overstay Report, Department of Homeland Security, available at <https://www.dhs.gov/publication/entryexit-overstay-report>.

¹⁶ See Fiscal Year 2016 Entry/Exit Overstay Report, Department of Homeland Security, page 12, available at <https://www.dhs.gov/publication/entryexit-overstay-report>.

Policy

Foreign students (F-1 nonimmigrants), exchange visitors (J-1 nonimmigrants), and vocational students (M-1 nonimmigrants), and their dependents, admitted or otherwise authorized to be present in the United States in duration of status (D/S) or admitted until a specific date (date certain) (in accordance with 8 CFR 214.2(f), 8 CFR 214.2(j), or 8 CFR 214.2(m)) start accruing unlawful presence as outlined below.¹⁷

When assessing whether an F, J, or M nonimmigrant accrued unlawful presence and was no longer in a period of stay authorized, the USCIS officer should consider information relating to the alien's immigration history, including but not limited to:

- Information contained in the systems available to USCIS;
- Information contained in the alien's record;¹⁸ and
- Information obtained through a Request for Evidence (RFE) or Notice of Intent to Deny (NOID), if any. The officer should follow current USCIS guidance on the issuance of RFEs or NOIDs.¹⁹

F, J, or M nonimmigrants who failed to maintain nonimmigrant status before August 9, 2018

F, J, or M nonimmigrants who failed to maintain their nonimmigrant status²⁰ before August 9, 2018 start accruing unlawful presence based on that failure on August 9, 2018,²¹ unless the alien had already started accruing unlawful presence on the earliest of the following:

¹⁷ Unless the nonimmigrant is otherwise protected from accruing unlawful presence, as outlined in AFM Chapter 40.9.2.

¹⁸ This includes the alien's admissions regarding his or her immigration history or other information discovered during the adjudication.

¹⁹ The assessment is made under the preponderance of the evidence standard. See *Matter of Chawathe*, 25 I&N Dec. 369, 375-376 (AAO 2010).

²⁰ The day the alien failed to maintain status may be determined by a DHS officer. For example, an F, J, or M nonimmigrant may fail to maintain status if he or she no longer is pursuing the course of study or the authorized activity before completing his or her course of study or program, or engages in unauthorized activity. An F, J, or M nonimmigrant also may fail to maintain his or her status if the alien remains in the United States after having completed the course of study or program (including any authorized practical training plus authorized grace period, as outlined in 8 CFR 214.2). Additionally, an F, J, or M nonimmigrant who is admitted for a date certain on his or her Form I-94, Arrival/Departure Record and remains in the United States beyond that date may fail to maintain his or her status. In accordance with 8 CFR 103.2(b)(16), if an adverse decision will result from a DHS officer's inadmissibility determination under INA 212(a)(9)(B) or INA 212(a)(9)(C)(i)(I) and that determination is based on derogatory information of which the alien is unaware, the officer generally will give the alien an opportunity to rebut that derogatory information.

²¹ An F, J, or M nonimmigrant who failed to maintain status before the effective date of this memorandum and remains in the United States without maintaining lawful status is generally present in violation of U.S. immigration

- The day after DHS denied the request for the immigration benefit, if DHS made a formal finding that the alien violated his or her nonimmigrant status while adjudicating a request for another immigration benefit;²²
- The day after the Form I-94, Arrival/Departure Record expired, if the F, J, or M nonimmigrant was admitted for a date certain; or
- The day after an immigration judge ordered the alien excluded, deported, or removed (whether or not the decision is appealed).

F, J, or M nonimmigrants who failed to maintain nonimmigrant status on or after August 9, 2018

An F, J, or M nonimmigrant begins accruing unlawful presence, due to a failure to maintain his or her status²³ **on or after** August 9, 2018, on the earliest of any of the following:

- The day after the F, J, or M nonimmigrant no longer pursues the course of study or the authorized activity, or the day after he or she engages in an unauthorized activity;
- The day after completing the course of study or program (including any authorized practical training plus any authorized grace period, as outlined in 8 CFR 214.2);
- The day after the Form I-94 expires, if the F, J, or M nonimmigrant was admitted for a date certain; or
- The day after an immigration judge orders the alien excluded, deported, or removed (whether or not the decision is appealed).

Foreign students (F nonimmigrant) generally do not accrue unlawful presence in certain situations, including but not limited to:

laws. Nevertheless, if DHS makes the inadmissibility determination under INA 212(a)(9)(B) or INA 212(a)(9)(C)(i)(I) on or after August 9, 2018, unlawful presence for such an alien begins accruing on August 9, 2018 and may continue to accrue for as long as the alien remains in unlawful status in the United States, unless the alien is or becomes otherwise protected from accruing unlawful presence, as outlined in this AFM Chapter 40.9.2.

²² Note that the policy for determining when unlawful presence begins to accrue remains unchanged for F, J, and M nonimmigrants for whom DHS made a formal finding of violation of nonimmigrant status before August 9, 2018.

²³ The day the alien failed to maintain his or her status may be determined by a DHS officer. In accordance with 8 CFR 103.2(b)(16), if an adverse decision will result from a DHS officer's inadmissibility determination under INA 212(a)(9)(B) or INA 212(a)(9)(C)(i)(I) and that determination is based on derogatory information of which the alien is unaware, the officer shall give the alien an opportunity to rebut that derogatory information.

- During the period permitted under 8 CFR 214.2(f)(5)(i) (period of up to 30 days before the program start date listed on the F-1 nonimmigrant's Form I-20);
- While the F-1 nonimmigrant is pursuing a full course of study at an educational institution approved by DHS for attendance by foreign students, and any additional periods of authorized pre- or post-completion practical training, including authorized periods of unemployment under 8 CFR 214.2(f)(10)(ii)(E);
- During a change in educational levels as outlined in 8 CFR 214.2(f)(5)(ii), provided the F-1 nonimmigrant transitions to the new educational level according to transfer procedures outlined in 8 CFR 214.2(f)(8);
- While the F-1 nonimmigrant is in a cap gap period under 8 CFR 214.2(f)(5)(vi), that is, during an automatic extension of an F-1 nonimmigrant's D/S and employment authorization as provided under 8 CFR 214.2(f)(5)(vi) for a beneficiary of an H-1B petition and request for a change of status that has been timely filed and states that the employment start date for the F-1 nonimmigrant is October 1 of the following fiscal year;
- While the F-1 nonimmigrant's application for post-completion Optional Practical Training (OPT) remains pending under 8 CFR 214.2(f)(10)(ii)(D);
- While the F-1 nonimmigrant is pursuing a school transfer provided that he or she has maintained status as provided in 8 CFR 214.2(f)(8);
- The period of time a timely-filed²⁴ reinstatement application under 8 CFR 214.2(f)(16) is pending with USCIS;
- The period of time an F-1 nonimmigrant was out of status if he or she applies for reinstatement under 8 CFR 214.2(f)(16), provided that the application is ultimately approved;
- During annual vacation permitted under 8 CFR 214.2(f)(5)(iii) if the F-1 nonimmigrant is eligible and intends to register for the next term;
- During any additional grace period as permitted under 8 CFR 214.2(f)(5)(iv) to prepare for departure:
 - 60 days following completion of a course of study and any authorized practical training;

²⁴ For purposes of tolling unlawful presence, a reinstatement application will be considered to be timely-filed if the applicant has not been out of status for more than 5 months at the time of filing the request for reinstatement.

- 15 days if the designated school official (DSO) authorized the withdrawal from classes (SEVIS termination reason: authorized early withdrawal); or
 - No grace period if the F-1 nonimmigrant failed to maintain a full course of study without the approval of the DSO or otherwise failed to maintain status.
- Emergent circumstances as outlined in 8 CFR 214.2(f)(5)(v), in which any or all of the requirements for on-campus or off-campus employment are suspended by a *Federal Register* notice and the student reduces his or her full course of study as a result of accepting employment based on the *Federal Register* notice; and
- During a period of reduced course load, as authorized by the DSO under 8 CFR 214.2(f)(6)(H)(iii).

Foreign exchange visitors (J nonimmigrants) generally do not accrue unlawful presence in certain situations, including but not limited to:

- The period of time annotated on Form DS-2019 as the approved program time plus any grace period, either before the program start date or after the conclusion of the program as outlined in 8 CFR 214.2(j)(1)(ii);
- Any extension of program time annotated on Form DS-2019 as outlined in 8 CFR 214.2(j)(1)(iv);
- While the J-1 nonimmigrant is in a cap gap period as outlined in 8 CFR 214.2(j)(1)(vi);²⁵ and
- The period of time a J-1 nonimmigrant was out of status, if he or she is granted reinstatement under 22 CFR 62.45.

Foreign vocational students (M nonimmigrants) generally do not accrue unlawful presence in certain situations, including but not limited to:

- The period of admission as indicated on Form I-94, plus up to 30 days before the report or start date of the course of study listed on the Form I-20 as outlined in 8 CFR 214.2(m)(5);
- Any authorized grace period as outlined in 8 CFR 214.2(m)(5);

²⁵ This is a discretionary provision in which the USCIS Director may, by notice in the *Federal Register*, bridge the gap for J-1 nonimmigrants.

- During the time the M-1 nonimmigrant completes authorized practical training as outlined in 8 CFR 214.2(m)(14);
- The period of time a timely-filed²⁶ reinstatement application under 8 CFR 214.2(m)(16) is pending with USCIS; and,
- The period of time an M-1 nonimmigrant was out of status if he or she applies for reinstatement under 8 CFR 214.2(m)(16), provided that the application is ultimately approved.

The period of stay authorized for an F-2, J-2, or M-2 nonimmigrant dependent (spouse or child) admitted for D/S or for a date certain is contingent on the F-1, J-1, or M-1 nonimmigrant remaining in a period of stay authorized. An F-2, J-2, or M-2 nonimmigrant's period of stay authorized ends when the F-1, J-1, or M-1 nonimmigrant's period of stay authorized ends. In addition, an F-2, J-2, or M-2 nonimmigrant's period of stay authorized may end due to the F-2, J-2, or M-2 nonimmigrant dependent's own conduct or circumstances.

An alien under 18 years of age does not accrue unlawful presence.²⁷ Therefore, any F, J, or M nonimmigrant who is under 18 years of age does not accrue unlawful presence. Additionally, the F, J, or M nonimmigrant may be otherwise protected from accruing unlawful presence, as outlined in this chapter.

(iv) Non-Controlled Nonimmigrants (for example, Canadian B-1/B-2)

Nonimmigrants who are not issued a Form I-94, Arrival/Departure Record, are treated as nonimmigrants admitted for D/S (as addressed in Chapter 40.9.2(b)(1)(E)(ii)) for purposes of determining unlawful presence.

(F) Other Types of Lawful Status

* * *

(2) Aliens Present in Unlawful Status Who Do Not Accrue Unlawful Presence by Statute for Purposes of Section 212(a)(9)(B) of the Act (Statutory Exceptions)

* * *

(3) Aliens Present in Unlawful Status Who Do Not Accrue Unlawful Presence by Virtue of USCIS Policy for Purposes of Sections 212(a)(9)(B) and (C)(i)(I) of the Act

²⁶ For purposes of tolling unlawful presence, a reinstatement application will be considered to be timely-filed if the applicant has not been out of status for more than 5 months at the time of filing the request for reinstatement.

²⁷ See INA 212(a)(9)(B)(iii)(I).

* * *

(D) Nonimmigrants – Effect of a Decision on the Request for Extension of Status (EOS) or Change of Status (COS) on Unlawful Presence

The following information pertains to applications requesting EOS or COS, or petitions that include requests for EOS or COS.

(i) Approved Requests

* * *

(ii) Denials Based on Frivolous Filings or Unauthorized Employment

If a request for EOS or COS is denied because it was frivolous or because the alien engaged in unauthorized employment, the EOS or COS application does not protect the alien from accruing unlawful presence. The alien accrues unlawful presence as outlined in Chapter 40.9.2(b)(1)(E), Lawful Nonimmigrants.

(iii) Denials of Untimely Applications

If a request for EOS or COS is denied because it was not timely filed, the EOS or COS application does not protect the alien from accruing unlawful presence. The alien accrues unlawful presence as outlined in Chapter 40.9.2(b)(1)(E), Lawful Nonimmigrants.

(iv) Denials for Cause of Timely Filed, Non-Frivolous Applications for EOS or COS

* * *

Use

This PM is intended solely for the guidance of USCIS personnel in the performance of their official duties. It is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law or by any individual or other party in removal proceedings, in litigation with the United States, or in any other form or manner.

Contact Information

If USCIS officers have questions or suggestions regarding this PM, they should direct them through their appropriate chains of command to the Office of Policy and Strategy.



May 10, 2018

PM-602-1060

Policy Memorandum

SUBJECT: Accrual of Unlawful Presence and F, J, and M Nonimmigrants

Purpose

This Policy Memorandum (PM) provides guidance to U.S. Citizenship and Immigration Services (USCIS) officers and assists USCIS officers in the calculation of unlawful presence of those in student (F nonimmigrant), exchange visitor (J nonimmigrant), or vocational student (M nonimmigrant) status and their dependents while in the United States. The PM also revises previous policy guidance in the USCIS Adjudicator's Field Manual (AFM) relating to this issue.

Authority

- INA 212(a)(9)(B)
- INA 212(a)(9)(C)

Background

Since the creation of the U.S. Department of Homeland Security (DHS), USCIS has followed the former Immigration and Naturalization Service's (INS) various policies on the accrual of unlawful presence. In 2009, USCIS consolidated its prior policy guidance in AFM Chapter 40.9.2.¹

According to that policy—to be superseded by this policy memorandum—foreign students and exchange visitors (F and J nonimmigrants, respectively) who were admitted for, or present in the United States in, duration of status (D/S) started accruing unlawful presence on the day after USCIS formally found a nonimmigrant status violation while adjudicating a request for another immigration benefit or on the day after an immigration judge ordered the applicant excluded, deported, or removed (whether or not the decision is appealed), whichever came first. F and J nonimmigrants, and foreign vocational students (M nonimmigrants), who were admitted until a specific date (date certain) accrued unlawful presence on the day after their Form I-94 expired, on the day after USCIS formally found a nonimmigrant status violation while adjudicating a request for another immigration benefit, or on the day after an immigration judge ordered the

¹ See USCIS Interoffice Memorandum, "Consolidation of Guidance Concerning Unlawful Presence for Purposes of Sections 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I) of the Act" (May 6, 2009).

applicant excluded, deported, or removed (whether or not the decision was appealed), whichever came first.²

The former INS policy, as consolidated in the AFM, went into effect in 1997, prior to the creation of some of the technologies and systems currently used by DHS to monitor nonimmigrants who are admitted to the United States in or otherwise acquire F, J, or M nonimmigrant status. Over the years, DHS also has made significant progress in its ability to identify and calculate the number of nonimmigrants who have failed to maintain status, including certain F, J, and M nonimmigrants.³

For example, since the creation of the policy, the Student and Exchange Visitor Information System (SEVIS)—the DHS system used to monitor F, J, and M nonimmigrants—has provided USCIS officers additional information about an alien’s immigration history, including information that indicates that an alien in F, J, or M nonimmigrant status may have completed or ceased to pursue his or her course of study or activity, as outlined in Form I-20, Certificate of Eligibility for Nonimmigrant Student Status, and related forms, or Form DS-2019, Certificate of Eligibility for Exchange Visitor (J-1) Status. For FY 2016, DHS calculated that a total of 1,457,556 aliens admitted in F, J, and M nonimmigrant status were either expected to change status or depart the United States. Of this population, it was estimated that the total overstay rate was 6.19 percent for F nonimmigrants, 3.80 percent for J nonimmigrants, and 11.60 percent for M nonimmigrants.⁴

To reduce the number of overstays and to improve how USCIS implements the unlawful presence ground of inadmissibility under INA 212(a)(9)(B) and INA 212(a)(9)(C)(i)(I), USCIS is now changing its policy on how to calculate unlawful presence for F-1, J-1, and M-1 nonimmigrants, and their dependents (F-2, J-2, and M-2).

² Under the former policy, an alien admitted for duration of status who overstayed or violated such status did not immediately begin accruing a period of unlawful presence for purposes of INA 212(a)(9)(B). Nevertheless, such alien was illegally present in the United States and would be amenable to removal proceedings under INA 237(a)(1)(C), which renders deportable aliens who violate their nonimmigrant status or any condition of their entry. Moreover, such aliens could be charged and ultimately convicted of any criminal offense requiring the alien to be illegally or unlawfully present in the United States as an element of the offense. For example, aliens who were admitted for duration of status and either violated or overstayed such status were treated as being illegally or unlawfully present in the United States for purposes of criminal culpability under the firearms provisions at 18 U.S.C. §§ 922(a)(6) and 922(g)(5). See *United States v. Rehaif*, --- F.3d ---, 2018 WL 1465527 (11th Cir. Mar. 26, 2018) (holding that a student who was academically dismissed, failed to depart the United States immediately, and therefore violated the terms of his F-1 status was unlawfully present for purposes of 18 U.S.C. § 922(g)(5)(A)); *United States v. Atandi*, 376 F.3d 1186, 1188 (10th Cir. 2004) (“Rather, we hold that an alien who is only permitted to remain in the United States for the duration of his or her status (as a student, for example) becomes ‘illegally or unlawfully in the United States’ for purposes of § 922(g)(5)(A) upon commission of a status violation.”); *United States v. Bazargan*, 992 F.2d 844, 847 (8th Cir. 1993) (“A nonimmigrant alien F-1 student becomes an illegal alien subject to deportation by failing to comply with the transfer procedures set forth in the INS regulations.”); *United States v. Igbatayo*, 764 F.2d 1039, 1040 (5th Cir. 1985) (per curiam) (“After failing to maintain the student status required by his visa, Igbatayo was without authorization to remain in this country.”).

³ See Fiscal Year 2016 Entry/Exit Overstay Report, Department of Homeland Security, *available at* <https://www.dhs.gov/publication/entryexit-overstay-report>.

⁴ See Fiscal Year 2016 Entry/Exit Overstay Report, Department of Homeland Security, page 12, *available at* <https://www.dhs.gov/publication/entryexit-overstay-report>.

Effective Date

This new guidance on the accrual of unlawful presence with respect to F, J and M nonimmigrants will take effect on August 9, 2018. The policy for determining unlawful presence for aliens present in the United States who are not in F, J, or M nonimmigrant status remains unchanged.

This guidance supersedes any prior guidance on this topic.

Policy

The new policy clarifies that F, J and M nonimmigrants, and their dependents, admitted or otherwise authorized to be present in the United States in duration of status (D/S) or admitted until a specific date (date certain), start accruing unlawful presence as outlined below.⁵

F, J, or M nonimmigrants who failed to maintain nonimmigrant status before August 9, 2018.

F, J, or M nonimmigrants who failed to maintain their nonimmigrant status⁶ before August 9, 2018 start accruing unlawful presence based on that failure on August 9, 2018,⁷ unless the alien had already started accruing unlawful presence on the earliest of the following:

- The day after DHS denied the request for an immigration benefit, if DHS made a formal finding that the alien violated his or her nonimmigrant status while adjudicating a request for another immigration benefit;⁸

⁵ Unless the nonimmigrant is otherwise protected from accruing unlawful presence, as outlined in AFM Chapter 40.9.2.

⁶ The day the alien failed to maintain status may be determined by a DHS officer. For example, an F, J, or M nonimmigrant may fail to maintain status if he or she no longer is pursuing the course of study or the authorized activity before completing his or her course of study or program, or engages in an unauthorized activity. An F, J, or M nonimmigrant also may fail to maintain his or her status if the alien remains in the United States after having completed the course of study or program (including any authorized practical training plus any authorized grace period, as outlined in 8 CFR 214.2). Additionally, an F, J, or M nonimmigrant who is admitted for a date certain on his or her Form I-94, Arrival/Departure Record and remains in the United States beyond that date may fail to maintain his or her status. In accordance with 8 CFR 103.2(b)(16), if an adverse decision will result from a DHS officer's inadmissibility determination under INA 212(a)(9)(B) or INA 212(a)(9)(C)(i)(I), and that determination is based on derogatory information of which the alien is unaware, the officer generally will give the alien an opportunity to rebut that derogatory information.

⁷ An F, J or M nonimmigrant who failed to maintain status before the effective date of this memorandum and remains in the United States without maintaining lawful status is generally present in violation of U.S. immigration laws. Nevertheless, if DHS makes the inadmissibility determination under INA 212(a)(9)(B) or INA 212(a)(9)(C)(i)(I) on or after August 9, 2018, unlawful presence for such an alien begins accruing on August 9, 2018 and may continue to accrue for as long as the alien remains in unlawful status in the United States, unless the alien is or becomes otherwise protected from accruing unlawful presence, as outlined in this AFM Chapter 40.9.2.

⁸ Note that the policy for determining when unlawful presence begins to accrue remains unchanged for F, J, and M nonimmigrants for whom DHS made a formal finding of violation of nonimmigrant status before August 9, 2018.

- The day after the Form I-94, Arrival/Departure Record, expired, if the F, J, or M nonimmigrant was admitted for a date certain; or
- The day after an immigration judge or, in certain cases, the Board of Immigration Appeals (BIA),⁹ ordered the alien excluded, deported, or removed (whether or not the decision is appealed).

F, J, or M nonimmigrants who failed to maintain nonimmigrant status on or August 9, 2018

An F, J, or M nonimmigrant begins accruing unlawful presence, due to a failure to maintain his or her status¹⁰ **on or after** August 9, 2018, on the earliest of any of the following:

- The day after the F, J, or M nonimmigrant no longer pursues the course of study or the authorized activity, or the day after he or she engages in an unauthorized activity;
- The day after completing the course of study or program (including any authorized practical training plus any authorized grace period, as outlined in 8 CFR 214.2);
- The day after the Form I-94 expires, if the F, J, or M nonimmigrant was admitted for a date certain; or
- The day after an immigration judge or, in certain cases, the BIA¹¹ orders the alien excluded, deported, or removed (whether or not the decision is appealed).

When assessing whether an F, J, or M nonimmigrant accrued unlawful presence and was no longer in a period of stay authorized, the USCIS officer should consider information relating to the alien's immigration history, including but not limited to:

- Information contained in the systems available to USCIS;
- Information contained in the alien's record;¹² and

⁹ There may be circumstances in which the BIA issues the removal order because the immigration judge did not order the alien removed. For example, if the immigration judge grants relief to the alien, and U.S. Immigration and Customs Enforcement (ICE) successfully appeals to the BIA, then the alien begins to accrue unlawful presence the day after the BIA issues the removal order.

¹⁰ The day the alien failed to maintain his or her status may be determined by a DHS officer. In accordance with 8 CFR 103.2(b)(16), if an adverse decision will result from a DHS officer's inadmissibility determination under INA 212(a)(9)(B) or INA 212(a)(9)(C)(i)(I) and that determination is based on derogatory information of which the alien is unaware, the officer, shall give the alien an opportunity to rebut that derogatory information.

¹¹ There may be circumstances in which the BIA issues the removal order because the immigration judge did not order the alien removed. For example, if the immigration judge grants relief to the alien, and ICE successfully appeals to the BIA, then the alien begins to accrue unlawful presence the day after the BIA issues the removal order.

¹² This includes the alien's admissions regarding his or her immigration history or other information discovered during the adjudication.

- Information obtained through a Request for Evidence (RFE) or Notice of Intent to Deny (NOID), if any. The officer should follow current USCIS guidance on the issuance of RFEs or NOIDs.¹³

The period of stay authorized for an F-2, J-2, or M-2 nonimmigrant dependent (spouse or child) admitted for D/S or for a date certain is contingent on the F-1, J-1, or M-1 nonimmigrant remaining in a period of stay authorized. An F-2, J-2, or M-2 nonimmigrant's period of stay authorized ends when the F-1, J-1, or M-1 nonimmigrant's period of stay authorized ends. In addition, an F-2, J-2, or M-2 nonimmigrant's period of stay authorized may end due to the F-2, J-2, or M-2 nonimmigrant dependent's own conduct or circumstances.

This new guidance on the accrual of unlawful presence with respect to F, J and M nonimmigrants will take effect on August 9, 2018. The policy for determining unlawful presence for aliens present in the United States who are not in F, J, or M nonimmigrant status remains unchanged.

This guidance supersedes any prior guidance on this topic.

Implementation

Chapter 40.9.2 of the AFM is revised by:

- Adding "Other than F, J, or M Nonimmigrants" to the heading of section 40.9.2(b)(1)(E)(i);
- Adding "Other Than F or J Nonimmigrants" to the heading of section 40.9.2(b)(1)(E)(ii);
- Creating a new section 40.9.2(b)(1)(E)(iii);
- Redesignating current section 40.9.2(b)(1)(E)(iii) as section 40.9.2(b)(1)(E)(iv) and amending the text; and
- Revising the text of section 40.9.2(b)(3)(D).

These revised AFM Chapter 40.9.2 sections, as amended, read as follows:

* * *

(b) Determining When an Alien Accrues Unlawful Presence

* * *

(1) Aliens Present in Lawful Status or as Parolees

¹³ The USCIS assessment is made under the preponderance of the evidence standard. See *Matter of Chawathe*, 25 I&N Dec. 369, 375-376 (AAO 2010).

* * *

(E) Lawful Nonimmigrants

The period of stay authorized for a nonimmigrant may end on a specific date or may continue for “duration of status (D/S).” Under current USCIS policy, nonimmigrants begin to accrue unlawful presence as follows:

(i) Nonimmigrants Admitted Until a Specific Date (Date Certain) Other Than F, J, or M Nonimmigrants

* * *

(ii) Nonimmigrants Admitted for Duration of Status (D/S) Other Than F or J Nonimmigrants

* * *

(iii) F or J Nonimmigrants Admitted for Duration of Status (D/S) or F, J, or M Nonimmigrants Admitted Until a Specific Date (Date Certain)

Background

Since the creation of the U.S. Department of Homeland Security (DHS), USCIS has followed the former Immigration and Naturalization Service’s (INS) various policies on the accrual of unlawful presence. In 2009, USCIS consolidated its prior policy guidance in this AFM chapter.¹⁴

According to that policy—now superseded by this guidance—foreign students and exchange visitors (F and J nonimmigrants, respectively) admitted for, or present in the United States in, duration of status (D/S) started accruing unlawful presence on the day after USCIS formally found a nonimmigrant status violation while adjudicating a request for another immigration benefit or on the day after an immigration judge ordered the applicant excluded, deported, or removed (whether or not the decision is appealed), whichever came first.¹⁵ F and J nonimmigrants, and foreign vocational students (M nonimmigrants), admitted until a specific date (date certain) accrued unlawful presence on the day after their Form I-94 expired, or on the day after USCIS formally found a nonimmigrant status violation while adjudicating a request for another immigration

¹⁴ See USCIS Interoffice Memorandum, “Consolidation of Guidance Concerning Unlawful Presence for Purposes of Sections 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I) of the Act” (May 6, 2009).

¹⁵ There may be circumstances in which the BIA issues the removal order because the immigration judge did not order the alien removed. For example, if the immigration judge grants relief to the alien, and ICE successfully appeals to the BIA, then the alien begins to accrue unlawful presence the day after the BIA issues the removal order.

benefit, or on the day after an immigration judge¹⁶ ordered the applicant excluded, deported, or removed (whether or not the decision was appealed), whichever came first.¹⁷

The former INS policy, as consolidated in the AFM, went into effect in 1997 prior to the creation of some of the technologies and systems currently used by DHS to monitor nonimmigrants who are admitted to the United States in or otherwise acquire F, J, or M nonimmigrant status. Over the years, DHS has also made significant progress in its ability to identify and calculate the number of nonimmigrants who have failed to maintain status, including certain F, J, or M nonimmigrants.¹⁸

For example, since the creation of the policy, the Student and Exchange Visitor Information System (SEVIS)—the DHS system used to monitor F, J, and M nonimmigrants—has provided USCIS officers additional information about an alien’s immigration history, including information that indicates that an alien in F, J, or M nonimmigrant status may have completed or ceased to pursue his or her course of study or activity, as outlined in Form I-20, Certificate of Eligibility for Nonimmigrant Student Status, and related forms, or Form DS-2019, Certificate of Eligibility for Exchange Visitor (J-1) Status. For FY 2016, DHS calculated that a total of 1,457,556 aliens admitted in F, J, and M nonimmigrant status were either expected to change status or depart the United States. Of this population, it was estimated that the total overstay rate was 6.19 percent for F nonimmigrants, 3.80 percent for J nonimmigrants, and 11.60 percent for M nonimmigrants.¹⁹

¹⁶ There may be circumstances in which the BIA issues the removal order because the immigration judge did not order the alien removed. For example, if the immigration judge grants relief to the alien, and ICE successfully appeals to the BIA, then the alien begins to accrue unlawful presence the day after the BIA issues the removal order.

¹⁷ Under the former policy, an alien admitted for duration of status who overstayed or violated such status did not immediately begin accruing unlawful presence for purposes of INA 212(a)(9)(B). Nevertheless, such alien was illegally present in the United States and would be amenable to removal proceedings under INA 237(a)(1)(C), which renders deportable aliens who violate their nonimmigrant status or any condition of their entry. Moreover, such aliens could be charged and ultimately convicted of any criminal offense requiring the alien to be illegally or unlawfully present in the United States as an element of the offense. For example, aliens who were admitted for duration of status and either violated or overstayed such status were treated as being illegally or unlawfully present in the United States for purposes of criminal culpability under the firearms provisions at 18 U.S.C. §§ 922(a)(6) and 922(g)(5). See *United States v. Rehaif*, --- F.3d ---, 2018 WL 1465527 (11th Cir. Mar. 26, 2018) (holding that a student who was academically dismissed, failed to depart the United States immediately, and therefore violated the terms of his F-1 status was unlawfully present for purposes of 18 U.S.C. § 922(g)(5)(A)); *United States v. Atandi*, 376 F.3d 1186, 1188 (10th Cir. 2004) (“Rather, we hold that an alien who is only permitted to remain in the United States for the duration of his or her status (as a student, for example) becomes ‘illegally or unlawfully in the United States’ for purposes of § 922(g)(5)(A) upon commission of a status violation.”); *United States v. Bazargan*, 992 F.2d 844, 847 (8th Cir. 1993) (“A nonimmigrant alien F-1 student becomes an illegal alien subject to deportation by failing to comply with the transfer procedures set forth in the INS regulations.”); *United States v. Igbatayo*, 764 F.2d 1039, 1040 (5th Cir. 1985) (per curiam) (“After failing to maintain the student status required by his visa, Igbatayo was without authorization to remain in this country.”).

¹⁸ See Fiscal Year 2016 Entry/Exit Overstay Report, Department of Homeland Security, available at <https://www.dhs.gov/publication/entryexit-overstay-report>.

¹⁹ See Fiscal Year 2016 Entry/Exit Overstay Report, Department of Homeland Security, page 12, available at <https://www.dhs.gov/publication/entryexit-overstay-report>.

To reduce the number of overstays and to improve how USCIS implements the unlawful presence ground of inadmissibility under INA 212(a)(9)(B) and INA 212(a)(9)(C)(i)(I), USCIS changed its policy on how to calculate unlawful presence for F-1, J-1, and M-1 nonimmigrants, and their dependents (F-2, J-2, and M-2) effective on August 9, 2018.

Policy

Foreign students (F-1 nonimmigrants), exchange visitors (J-1 nonimmigrants), and vocational students (M-1 nonimmigrants), and their dependents, admitted or otherwise authorized to be present in the United States in duration of status (D/S) or admitted until a specific date (date certain) (in accordance with 8 CFR 214.2(f), 8 CFR 214.2(j) or 8 CFR 214.2(m)) start accruing unlawful presence as outlined below.²⁰

When assessing whether an F, J, or M nonimmigrant accrued unlawful presence and was no longer in a period of stay authorized, the USCIS officer should consider information relating to the alien's immigration history, including but not limited to:

- Information contained in the systems available to USCIS;
- Information contained in the alien's record;²¹ and
- Information obtained through a Request for Evidence (RFE) or Notice of Intent to Deny (NOID), if any. The officer should follow current USCIS guidance on the issuance of RFEs or NOIDs.²²

F, J or M nonimmigrants who failed to maintain nonimmigrant status before August 9, 2018

F, J, or M nonimmigrants who failed to maintain their nonimmigrant status²³ before August 9, 2018

²⁰ Unless the nonimmigrant is otherwise protected from accruing unlawful presence, as outlined in AFM Chapter 40.9.2.

²¹ This includes the alien's admissions regarding his or her immigration history or other information discovered during the adjudication.

²² The assessment is made under the preponderance of the evidence standard. See *Matter of Chawathe*, 25 I&N Dec. 369, 375-376 (AAO 2010).

²³ The day the alien failed to maintain status may be determined by a DHS officer. For example, an F, J, or M nonimmigrant may fail to maintain status if he or she no longer is pursuing the course of study or the authorized activity before completing his or her course of study or program, or engages in unauthorized activity. An F, J, or M nonimmigrant also may fail to maintain his or her status if the alien remains in the United States after having completed the course of study or program (including any authorized practical training plus authorized grace period, as outlined in 8 CFR 214.2). Additionally, an F, J, or M nonimmigrant who is admitted for a date certain on his or her Form I-94, Arrival/Departure Record and remains in the United States beyond that date may fail to maintain his or her status. In accordance with 8 CFR 103.2(b)(16), if an adverse decision will result from a DHS officer's inadmissibility determination under INA 212(a)(9)(B) or INA 212(a)(9)(C)(i)(I) and that determination is based on

start accruing unlawful presence based on that failure on August 9, 2018,²⁴ unless the alien had already started accruing unlawful presence on the earliest of the following:

- The day after DHS denied the request for the immigration benefit, if DHS made a formal finding that the alien violated his or her nonimmigrant status while adjudicating a request for another immigration benefit;²⁵
- The day after the Form I-94, Arrival/Departure Record expired, if the F, J, or M nonimmigrant was admitted for a date certain; or
- The day after an immigration judge or, in certain cases, the Board of Immigration Appeals (BIA)²⁶ ordered the alien excluded, deported, or removed (whether or not the decision is appealed).

F, J, or M nonimmigrants who failed to maintain nonimmigrant status on or after August 9, 2018

An F, J, or M nonimmigrant begins accruing unlawful presence, due to a failure to maintain his or her status²⁷ **on or after** August 9, 2018, on the earliest of any of the following:

- The day after the F, J, or M nonimmigrant no longer pursues the course of study or the authorized activity, or the day after he or she engages in an unauthorized activity;
- The day after completing the course of study or program (including any authorized practical training plus any authorized grace period, as outlined in 8 CFR 214.2);

derogatory information of which the alien is unaware, the officer generally will give the alien an opportunity to rebut that derogatory information.

²⁴ An F, J, or M nonimmigrant who failed to maintain status before the effective date of this memorandum and remains in the United States without maintaining lawful status is generally present in violation of U.S. immigration laws. Nevertheless, if DHS makes the inadmissibility determination under INA 212(a)(9)(B) or INA 212(a)(9)(C)(i)(I) on or after August 9, 2018, unlawful presence for such an alien begins accruing on August 9, 2018 and may continue to accrue for as long as the alien remains in unlawful status in the United States, unless the alien is or becomes otherwise protected from accruing unlawful presence, as outlined in this AFM Chapter 40.9.2.

²⁵ Note that the policy for determining when unlawful presence begins to accrue remains unchanged for F, J, and M nonimmigrants for whom DHS made a formal finding of violation of nonimmigrant status before August 9, 2018.

²⁶ There may be circumstances in which the BIA issues the removal order because the immigration judge did not order the alien removed. For example, if the immigration judge grants relief to the alien, and U.S. Immigration and Customs Enforcement (ICE) successfully appeals to the BIA, then the alien begins to accrue unlawful presence the day after the BIA issues the removal order.

²⁷ The day the alien failed to maintain his or her status may be determined by a DHS officer. In accordance with 8 CFR 103.2(b)(16), if an adverse decision will result from a DHS officer's inadmissibility determination under INA 212(a)(9)(B) or INA 212(a)(9)(C)(i)(I) and that determination is based on derogatory information of which the alien is unaware, the officer shall give the alien an opportunity to rebut that derogatory information.

- The day after the Form I-94 expires, if the F, J, or M nonimmigrant was admitted for a date certain; or
- The day after an immigration judge or, in certain cases the BIA²⁸ orders the alien excluded, deported, or removed (whether or not the decision is appealed).

Foreign students (F nonimmigrant) generally do not accrue unlawful presence in certain situations, including but are not limited to:

- During the period permitted under 8 CFR 214.2(f)(5)(i) (period of up to 30 days before the program start date listed on the F-1 nonimmigrant's Form I-20);
- While the F-1 nonimmigrant is pursuing a full course of study at an educational institution approved by DHS for attendance by foreign students, and any additional periods of authorized pre- or post-completion practical training, including authorized periods of unemployment under 8 CFR 214.2(f)(10)(ii)(E);
- During a change in educational levels as outlined in 8 CFR 214.2(f)(5)(ii), provided the F-1 nonimmigrant transitions to the new educational level according to transfer procedures outlined in 8 CFR 214.2(f)(8);
- While the F-1 nonimmigrant is in a cap gap period under 8 CFR 214.2(f)(5)(vi), that is, during an automatic extension of an F-1 nonimmigrant's D/S and employment authorization as provided under 8 CFR 214.2(f)(5)(vi) for a beneficiary of an H-1B petition and request for a change of status that has been timely filed and states that the employment start date for the F-1 nonimmigrant is October 1 of the following fiscal year;
- While the F-1 nonimmigrant's application for post-completion Optional Practical Training (OPT) remains pending under 8 CFR 214.2(f)(10)(ii)(D);
- While the F-1 nonimmigrant is pursuing a school transfer provided that he or she has maintained status as provided in 8 CFR 214.2(f)(8);
- The period of time an F-1 nonimmigrant was out of status if he or she applies for reinstatement under 8 CFR 214.2(f)(16), provided that the application is ultimately approved;²⁹

²⁸ There may be circumstances in which the BIA issues the removal order because the immigration judge did not order the alien removed. For example, if the immigration judge grants relief to the alien, and ICE successfully appeals to the BIA, then the alien begins to accrue unlawful presence the day after the BIA issues the removal order.

²⁹ Filing a reinstatement request does not by itself place the alien into a period of stay authorized and, therefore, does not stop the alien from accruing unlawful presence. If the request is ultimately denied, the F-1 nonimmigrant began to accrue unlawful presence (and is not in a period of stay authorized) the day after the alien stopped pursuing the course of study or authorized activity, unless he or she is otherwise protected from accruing unlawful presence. If

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- During annual vacation permitted under 8 CFR 214.2(f)(5)(iii) if the F-1 nonimmigrant is eligible and intends to register for the next term;
- During any additional grace period as permitted under 8 CFR 214.2(f)(5)(iv) to prepare for departure:
 - 60 days following completion of a course of study and any authorized practical training;
 - 15 days if the designated school official (DSO) authorized the withdrawal from classes (SEVIS termination reason: authorized early withdrawal); or
 - No grace period if the F-1 nonimmigrant failed to maintain a full course of study without the approval of the DSO or otherwise failed to maintain status).
- Emergent circumstances as outlined in 8 CFR 214.2(f)(5)(v), in which any or all of the requirements for on-campus or off-campus employment are suspended by a Federal Register notice and the student reduces his or her full course of study as a result of accepting employment based on the *Federal Register* notice; and
- During a period of reduced course load, as authorized by the DSO under 8 CFR 214.2(f)(6)(H)(iii).

Foreign exchange visitors (J nonimmigrants) generally do not accrue unlawful presence in certain situations, including but not limited to:

- The period of time annotated on Form DS-2019 as the approved program time plus any grace period, either before the program start date or after the conclusion of the program as outlined in 8 CFR 214.2(j)(1)(ii);
- Any extension of program time annotated on Form DS-2019 as outlined in 8 CFR 214.2(j)(1)(iv); and
- While the J-1 nonimmigrant is in a cap gap period as outlined in 8 CFR 214.2(j)(1)(vi).³⁰

Foreign vocational students (M nonimmigrants) generally do not accrue unlawful presence in certain situations, including but not limited to:

the reinstatement application is approved, however, no unlawful presence generally will have accrued during the time period in which the student was out of status.

³⁰ This is a discretionary provision in which the USCIS Director may, by notice in the *Federal Register*, bridge the gap for J-1 nonimmigrants.

- The period of admission as indicated on Form I-94, plus up to 30 days before the report or start date of the course of study listed on the Form I-20 as outlined in 8 CFR 214.2(m)(5);
- Any authorized grace period as outlined in 8 CFR 214.2(m)(5); and
- During the time the M-1 nonimmigrant completes authorized practical training as outlined in 8 CFR 214.2(m)(14).

The period of stay authorized for an F-2, J-2, or M-2 nonimmigrant dependent (spouse or child) admitted for D/S or for a date certain is contingent on the F-1, J-1, or M-1 nonimmigrant remaining in a period of stay authorized. An F-2, J-2, or M-2 nonimmigrant's period of stay authorized ends when the F-1, J-1, or M-1 nonimmigrant's period of stay authorized ends. In addition, an F-2, J-2, or M-2 nonimmigrant's period of stay authorized may end due to the F-2, J-2, or M-2 nonimmigrant dependent's own conduct or circumstances.

An alien under 18 years of age does not accrue unlawful presence.³¹ Therefore, any F, J, or M nonimmigrant who is under 18 years of age does not accrue unlawful presence. Additionally, the F, J, or M nonimmigrant may be otherwise protected from accruing of unlawful presence, as outlined in this chapter.

(iv) Non-Controlled Nonimmigrants (for example, Canadian B-1/B-2)

Nonimmigrants who are not issued a Form I-94, Arrival/Departure Record, are treated as nonimmigrants admitted for D/S (as addressed in Chapter 40.9.2(b)(1)(E)(ii)) for purposes of determining unlawful presence.

(F) Other Types of Lawful Status

* * *

(2) Aliens Present in Unlawful Status Who Do Not Accrue Unlawful Presence by Statute for Purposes of Section 212(a)(9)(B) of the Act (Statutory Exceptions)

* * *

(3) Aliens Present in Unlawful Status Who Do Not Accrue Unlawful Presence by Virtue of USCIS Policy for Purposes of Sections 212(a)(9)(B) and (C)(i)(I) of the Act

* * *

³¹ See INA 212(a)(9)(B)(iii)(I).

(D) Nonimmigrants – Effect of a Decision on the Request for Extension of Status (EOS) or Change of Status (COS) on Unlawful Presence

The following information pertains to applications requesting EOS or COS, or petitions that include requests for EOS or COS.

(i) Approved Requests

* * *

(ii) Denials Based on Frivolous Filings or Unauthorized Employment

If a request for EOS or COS is denied because it was frivolous or because the alien engaged in unauthorized employment, the EOS or COS application does not protect the alien from accruing unlawful presence. The alien accrues unlawful presence as outlined in Chapter 40.9.2(b)(1)(E), Lawful Nonimmigrants.

(iii) Denials of Untimely Applications

If a request for EOS or COS is denied because it was not timely filed, the EOS or COS application does not protect the alien from accruing unlawful presence. The alien accrues unlawful presence as outlined in Chapter 40.9.2(b)(1)(E), Lawful Nonimmigrants.

(iv) Denials for Cause of Timely Filed, Non-Frivolous Applications for EOS or COS

* * *

Use

This PM is intended solely for the guidance of USCIS personnel in the performance of their official duties. It is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law or by any individual or other party in removal proceedings, in litigation with the United States, or in any other form or manner.

Contact Information

If USCIS officers have questions or suggestions regarding this PM, they should direct them through their appropriate chains of command to the Office of Policy and Strategy.



U.S. Citizenship
and Immigration
Services

Interoffice Memorandum

To: Field Leadership

From: Donald Neufeld /s/
Acting Associate Director
Domestic Operations Directorate

From: Lori Scialabba /s/
Associate Director
Refugee, Asylum and International Operations Directorate

From: Pearl Chang /s/
Acting Chief
Office of Policy and Strategy

Date: May 6, 2009

Re: Consolidation of Guidance Concerning Unlawful Presence for Purposes of Sections
212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I) of the Act

Revision to and Re-designation of *Adjudicator's Field Manual (AFM)* Chapter 30.1(d) as
Chapter 40.9 (*AFM* Update AD 08-03)

1. Purpose

Chapter 30.1(d) of the *Adjudicator's Field Manual* consolidates USCIS guidance to adjudicators for determining when an alien accrues unlawful presence, for purposes of inadmissibility under section 212(a)(9)(B) or (C) of the Immigration and Nationality Act. This memorandum re-designates Chapter 30.1(d) of the *AFM* as chapter 40.9 of the *AFM*. This memorandum also revises newly re-designated Chapter 40.9 to clarify the available guidance, and to incorporate into Chapter 40.9 prior guidance that was issued after adoption of former Chapter 30.1(d) but not incorporated into former Chapter 30.1(d).

USCIS intends *AFM* Chapter 40.9 to provide comprehensive guidance to adjudicators concerning the accrual of unlawful presence and the resulting inadmissibility. Since Chapter 40.9 provides comprehensive guidance, the following prior memoranda are rescinded in their entirety:

Date	Subject
September 19, 1997	Section 212(a)(9)(B) Relating to Unlawful Presence
March 3, 2000	Period of stay authorized by the Attorney General after 120-day tolling period for purposes of section 212(a)(9)(B) of the Immigration and Nationality Act (the Act) (AD 00-07)
June 12, 2002	Unlawful Presence
April 2, 2003	Guidance on Interpretation of “Period of Stay Authorized by the Attorney General” in Determining “Unlawful Presence” under Section 212(a)(9)(B)(ii) of the Immigration and Nationality Act (Act)

Also, the following memoranda are rescinded, insofar as they dealt with inadmissibility under section 212(a)(9)(B) or (C) of the Act.

Date	Subject
March 31, 1997	Implementation of section 212(a)(6)(A) and 212(9) grounds of Inadmissibility
June 17, 1997	Additional Guidance for Implementing Sections 212(a)(6) and 212(a)(9) of the Immigration and Nationality Act (Act)

Also rescinded is any other USCIS memorandum (or legacy INS memorandum) that addresses inadmissibility under section 212(a)(9)(B) or (C) of the Act, to the extent that any other such memorandum is inconsistent with *AFM* Chapter 40.9.

2. Background

The three- and ten-year bars to admissibility of section 212(a)(9)(B)(i) of the Act and the permanent bar to admissibility of section 212(a)(9)(C)(i)(I) of the Act were added by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (Div. C of PL 104-208 (September 30, 1996)) (IIRIRA). The amendments enacting sections 212(a)(9)(B) and (C) became effective on April 1, 1997.

Section 212(a)(9)(B)(i)(I) of the Act renders inadmissible those aliens who were unlawfully present for more than 180 days but less than one (1) year, who voluntarily departed the United States prior to the initiation of removal proceedings and who seek admission within three (3) years of the date of such departure or removal from the United States. Section 212(a)(9)(B)(i)(II) of the Act renders inadmissible those aliens unlawfully present for one (1) year or more, and who seek admission within ten (10) years of the date of the alien’s departure or removal from the United States. Finally, section 212(a)(9)(C)(i)(I) of the Act renders inadmissible any alien who

has been unlawfully present in the United States for an aggregate period of more than one (1) year, and who enters or attempts to reenter the United States without being admitted.

Section 212(a)(9)(B)(ii) of the Act specifies that "unlawful presence" can accrue during any period in which an alien, other than a Legal Permanent Resident, is present in the United States without having been admitted or paroled, or after the expiration of the period of stay authorized by the Secretary of Homeland Security. As discussed in *AFM* Chapter 40.9.2, there are other situations in which an alien who is actually in an unlawful immigration status is, nevertheless, protected from the accrual of unlawful presence.

Over the last ten (10) years, the determination of what constitutes "unlawful presence" has been the subject of various interpretations, in part because of legislation amending the rights of aliens seeking immigration benefits. Legacy Immigration and Naturalization Service (INS) and the United States Citizenship and Immigration Services (USCIS) have issued several memoranda on this issue; however, sometimes, the *AFM* was not updated. Therefore, this revised and re-designated section 40.9.2 in the *AFM* consolidates the information contained in these memoranda and updates the *AFM*.

In general, the consequences of accruing unlawful presence depend on the immigration status of an individual, the particular type of benefit or relief sought, and whether the denial of the benefit is subject to administrative and judicial review. The details are set forth in the field guidance below.

3. Field Guidance and *AFM* Update

The adjudicator is directed to comply with the guidance provided in the *AFM* as amended by this memorandum. Additionally, overseas adjudication officers can also find guidance on this issue, tailored to the overseas context, in the International Operations "Procedures for Adjudication of Form I-601 for Overseas Adjudication Officers" dated July 30, 2008 or subsequent revisions.

The *AFM* is updated as follows:

1. Chapter 30.1(d) of the *AFM* entitled "Unlawful Presence Under Section 212(a)(9) of the Act" is re-designated as Chapter 40.9 and
2. Chapter 40.9 and is amended as follows:

40.9 Aliens Previously Removed and Unlawfully Present (Section 212(a)(9) of the Act)

Section 212(a)(9) of the Act renders certain aliens inadmissible based on prior violations of U.S. immigration law. Section 212(a)(9) of the Act has three major subsections.

Under Section 212(a)(9)(A) of the Act, an alien, who was deported, excluded or removed under any provision of law, is inadmissible if the alien seeks admission to the

United States during the period specified in section 212(a)(9)(A) of the Act, unless the alien obtains consent to reapply for admission during this period.

Under section 212(a)(9)(B) of the Act, an alien is inadmissible if the alien has accrued a specified period of unlawful presence, leaves the United States after accruing the unlawful presence, and then seeks admission during the period specified in section 212(a)(9)(B)(i) (either 3 years or 10 years after the departure, depending on the duration of the accrued unlawful presence).

Under Section 212(a)(9)(C)(i) of the Act, an alien is inadmissible if the alien enters or attempts to enter the United States without admission after having been removed or after having accrued more than one year (in the aggregate) of unlawful presence.

AFM Chapter 40.9.2 provides an overview of USCIS' policy concerning the accrual of unlawful presence and the resulting inadmissibility under section 212(a)(9)(B) or section 212(a)(9)(C)(i)(I) of the Act.

40.9.1 Inadmissibility Based on Prior Removal (Section 212(a)(9)(A) of the Act) or Based on Unlawful Return after Prior Removal (Section 212(a)(9)(C)(i)(II) of the Act)) [Reserved]

40.9.2 Inadmissibility Based on Prior Unlawful Presence (Sections 212(a)(9)(B) and (C)(i)(I) of the Act)

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(7) Multiple Grounds of Inadmissibility and the Relationship Between Sections 212(a)(9)(B)(i)(I), (B)(i)(II), and (C)(i)(I) of the Act

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(9) Effective Date of Sections 212(a)(9)(B) and (C)(i)(I) of the Act

(A) Effective Date

(B) The Child Status Protection Act and Its Influence on Unlawful Presence

(b) Determining When an Alien Accrues Unlawful Presence

(1) Aliens Present in Lawful Status or as Parolees

(A) Lawful Permanent Residents (LPRs)

(B) Lawful Temporary Residents (Section 245A(b) of the Act and 8 CFR 245a)

(C) Conditional Permanent Residents under Sections 216 and 216A of the Act

(D) Aliens Granted Cancellation of Removal or Suspension of Deportation

(E) Lawful Nonimmigrants

(i) Nonimmigrants Admitted until a Specific Date (Date Certain)

(ii) Nonimmigrants Admitted for Duration of Status (D/S)

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(F) Other Types of Lawful Status

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(2) Aliens Present in Unlawful Status Who Do Not Accrue Unlawful Presence by Statute for Purposes of Section 212(a)(9)(B) of the Act (Statutory Exceptions)

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- (B) Aliens with Pending Asylum Applications (Including Children Aging Out and Dependents of Asylum Applicants)
- (C) Aliens Physically Present in the United States with pending Forms I-730
- (D) Beneficiary of Family Unity Protection (FUP) Granted pursuant to Section 301 of the Immigration Act of 1990; 8 CFR 236.15
- (E) Certain Battered Spouses, Parents, and Children
- (F) Victims of Severe Form of Trafficking in Persons
- (G) Nonimmigrants with Pending Requests for Extension of Status (EOS) or Change of Status (COS) ("Tolling")

(3) Aliens Present in Unlawful Status Who Do Not Accrue Unlawful Presence By Virtue of USCIS Policy for Purposes of Sections 212(a)(9)(B) and (C)(i)(I) of the Act

- (A) Aliens with Properly Filed Pending Applications for Adjustment of Status or Registry (Sections 209, 245, 245(i), and 249 of the Act, Sections 202 of Public Law 99-603 Cuban Haitian Adjustment, Section 202(b) of the Nicaraguan Adjustment and Central American Relief Act (NACARA), section 902 of the Haitian Refugee Immigration Fairness Act of 1998 (HRIFA))
- (B) Nonimmigrants with Pending Requests for Extension of Status (EOS) or Change of Status (COS) ("Tolling")
- (C) Nonimmigrants with Pending Requests for Extension of Status (EOS) or Change of Status (COS) Who Depart the United States During the Pendency
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 - (i) Approved Requests
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- (G) Aliens with Pending Applications for Temporary Protected Status (TPS) pursuant to Section 244 of the Act
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- (I) Aliens Granted Stay of Removal
- (J) Aliens Granted Deferred Action
- (K) Aliens Granted Withholding of Removal under Section 241(b)(3) of the Act or Withholding of Deportation under Former Section 243 of the Act
- (L) Aliens Granted Withholding of Removal or Deferral of Removal under the United Nations Convention Against Torture Pursuant to 8 CFR 208.16 and 8 CFR 208.17
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(4) Effect of the Protection from the Accrual of Unlawful Presence on Previously Accrued Unlawful Presence: Protection from the Accrual of Unlawful Presence Does Not Cure Previously Accrued Unlawful Presence

(5) Effect of Removal Proceedings on Unlawful Presence

- (A) Initiation of Removal Proceedings
- (B) Effect of Filing an Appeal or Petition for Review on Unlawful Presence

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(c) Relief from Inadmissibility under Section 212(a)(9)(B)(i)(I) and (II), and Section 212(a)(9)(C)(i)(I) of the Act

(1) Waiver of the 3-Year Bar or the 10-Year Bar under Section 212(a)(9)(B)(i) of the Act

- (A) Nonimmigrants
- (B) Immigrants and Adjustment of Status Applicants Who Are the Spouses, Sons, or Daughters of U.S. Citizens or LPRs, and Fiancé(e) of U.S. Citizens
- (C) Asylees and Refugees Applying for Adjustment of Status
- (D) TPS Applicants
- (E) Legalization under the CSS LULAC and NWRIP Class Settlement Agreements, and Legalization Applicants pursuant to 8 CFR 245a.2(k) and 8 CFR 245a.18

(2) Waiver of the Permanent Bar under Section 212(a)(9)(C)(i)(I) of the Act

- (A) HRIFA and NACARA Applicants
- (B) Legalization, SAW, LIFE Act Legalization, and Legalization Class Settlement Agreement Applicants
- (C) TPS Applicants
- (D) Certain Battered Spouses, Parents, and Children
- (E) Asylee and Refugee Adjustment Applicants under Section 209(c) of the Act

(a) General Overview

If an alien, other than an alien lawfully admitted for permanent residence, accrues unlawful presence in the United States, he or she may be inadmissible pursuant to section 212(a)(9)(B)(i)(Three-year and Ten-year bars) or 212(a)(9)(C)(i)(I) of the Act (Permanent bar).

(1) Outline of Section 212(a)(9)(B)(i) and Section 212(a)(9)(C)(i)(I) of the Act

(A) Section 212(a)(9)(B)(i) of the Act - The 3-Year and the 10-Year Bars. Section 212(a)(9)(B)(i) is broken into two (2) sub-groups:

- Section 212(a)(9)(B)(i)(I) of the Act (3-year bar). This provision renders inadmissible for three (3) years those aliens, who were unlawfully present for more than 180 days but less than one (1) year, and who departed from the United States voluntarily prior to the initiation of removal proceedings.
- Section 212(a)(9)(B)(i)(II) of the Act (10-year bar). This provision renders inadmissible an alien, who was unlawfully present for one (1) year or more, and who seeks again admission within ten (10) years of the date of the alien's departure or removal from the United States.

Both bars can be waived pursuant to section 212(a)(9)(B)(v) of the Act.

(B) Section 212(a)(9)(C)(i)(I) of the Act - The Permanent Bar. This provision renders an individual inadmissible, if he or she has been unlawfully present in the United States for an aggregate period of more than one (1) year, and who enters or attempts to reenter the United States without being admitted. An alien, who is inadmissible under section 212(a)(9)(C)(i)(I) of the Act is permanently inadmissible; however, after having been outside the United States for at least ten (10) years, he or she may seek consent to reapply for admission pursuant to section 212(a)(9)(C)(ii) of the Act and 8 CFR 212.2. A waiver is also available for certain Violence Against Women Act (VAWA) self-petitioners under section 212(a)(9)(C)(iii) of the Act. The 10-year absence requirement does not apply to a VAWA self-petitioner who is seeking a waiver under section 212(a)(9)(C)(iii) of the Act, rather than seeking consent to reapply under section 212(a)(9)(C)(ii) of the Act.

A DHS regulation at 8 CFR 212.2 addresses the filing and adjudication of an application for consent to reapply (filed on Form I-212). As stated by the Board of Immigration Appeals (BIA) in *Matter of Torres-Garcia*, 23 I&N Dec. 866 (BIA 2006), however, the consent to reapply regulation at 8 CFR 212.2 predates the enactment of section 212(a)(9)(C) of the Act and the related consent to reapply provision in section 212(a)(9)(A)(iii) of the Act. Thus, although the *filing procedures* in 8 CFR 212.2 are still in effect, the substantive requirements of section 212(a)(9) of the Act govern during the adjudication of Form I-212, Application for Permission to Reapply for Admission into the United States After Deportation and Removal. A USCIS adjudicator must consider the specific requirements of section 212(a)(9)(C)(ii) of the Act when adjudicating Form I-212

that is filed by an alien who is inadmissible under section 212(a)(9)(C)(i) of the Act. That is, because of the 10-year absence requirement for consent to reapply, section 212(a)(9)(C)(i)(I) of the Act is a permanent bar for which neither the retroactive nor the prospective grant of consent to reapply is possible. The regulatory language at 8 CFR 212.2(i) and (j) is not applicable, see *Torres-Garcia*, at 875, and the alien has to be physically outside the United States for a period of at least ten years since his or her last departure before being eligible to be granted consent to reapply. See *id.*, at 876. Finally, the regulatory language referring to the 5-year and the 20-year limitation on consent to reapply does not apply to section 212(a)(9)(C) of the Act; these limitations refer to former sections 212(a)(6)(A) and (B), the predecessors of current section 212(a)(9)(A) of the Act. See *id.* at 874 (for a historical analysis).

Also, an adjudicator should pay special attention to the possibility that an alien who is inadmissible under section 212(a)(9)(C)(i)(II) of the Act (because the alien entered or attempted to enter without admission after having been removed) may be subject to the reinstatement provision of section 241(a)(5) of the Act (reinstatement of removal orders).

(2) Distinction Between "Unlawful Status" and "Unlawful Presence"

To understand the operation of sections 212(a)(9)(B) and 212(a)(9)(C)(i)(I) of the Act, it is important to comprehend the difference between being in an unlawful immigration status and the accrual of unlawful presence ("period of stay not authorized"). Although these concepts are related (one must be present in an unlawful status in order to accrue unlawful presence), they are not the same.

As discussed in chapters 40.9.2(b)(2) and (3), there are situations in which an alien who is present in an unlawful status nevertheless does not accrue unlawful presence. As a matter of prosecutorial discretion, DHS may permit an alien who is present in the United States unlawfully, but who has pending an application that stops the accrual of unlawful presence, to remain in the United States while that application is pending. In this sense, the alien's remaining can be said to be "authorized." However, the fact that the alien does not accrue unlawful presence does *not* mean that the alien's presence in the United States is actually lawful.

Example 1: An alien is admitted as a nonimmigrant, with a Form I-94 that expires on January 1, 2009. The alien remains in the United States after the Form I-94 expires. The alien's status becomes unlawful, and she begins to accrue unlawful presence, on January 2, 2009. On May 10, 2009, the alien properly files an application for adjustment of status. The filing of the adjustment application stops the accrual of unlawful presence. But it does not "restore" the alien to a substantively lawful immigration status. She is still amenable to removal as a deportable alien under section 237(a)(1)(C) of the Act because she has remained after the expiration of her nonimmigrant admission.

Example 2: An alien is admitted as a nonimmigrant, with a Form I-94 that expires on January 1, 2009. On October 5, 2008, he properly files an application for adjustment of status. He does not, however, file any application to extend his nonimmigrant stay, which expires on January 1, 2009. The adjustment of status application is still pending on January 2, 2009. On January 2, 2009, he becomes subject to removal as a deportable alien under section 237(a)(1)(C) of the Act because he has remained after the expiration of his nonimmigrant admission. For purposes of future inadmissibility, however, the pending adjustment application protects him from the accrual of unlawful presence.

The application of section 245(k) of the Act is a good example of the importance of clearly distinguishing unlawful *status* from the accrual of unlawful presence. Guidance concerning section 245(k) may be found in chapter 23.5(d) of the AFM. If the requirements of section 245(k) are met, this provision relieves certain employment-based immigrants of ineligibility under section 245(c)(2), (c)(7) or (c)(8) of the Act for adjustment of status. For example, an alien who failed to maintain a lawful status after any entry is, ordinarily, ineligible for adjustment of status under section 245(c)(2) of the Act. Departure from the United States and return does, ordinarily, not relieve the alien of this provision. 8 CFR 245.1(d)(3). For an alien who is eligible for the benefit of section 245(k) of the Act, however, only a failure to maintain status since the *last lawful admission* is considered in determining whether the alien is subject to section 245(c)(2), (c)(7) or (c)(8) of the Act. AFM Chapter 23.5(d)(4). Unless the alien, since the last lawful admission failed to maintain lawful status for at least 181 days, section 245(k) of the Act relieves the alien of ineligibility under section 245(c)(2), (c)(7) or (c)(8) of the Act.

As stated in chapters 40.9.2(b)(2) and (3), some aliens who are actually present in an unlawful *status*, are, nevertheless, protected from accruing unlawful presence. But if their unlawful status continues for more than 180 days, in the aggregate, they would be ineligible for the benefit of section 245(k) of the Act, *even if they have accrued no unlawful presence for purposes of section 212(a)(9)(B) of the Act.*

Example 3: An alien is admitted for “duration of status” as an F-1 nonimmigrant student. One year later, the alien drops out of school, and remains in the United States for one year after dropping out. The alien’s status became unlawful when she dropped out of school. Neither USCIS nor an IJ ever makes a finding that the alien was out of status; therefore, she never accrues any unlawful presence for purposes of section 212(a)(9)(B) of the Act. Chapter 40.9.2(b)(1)(E)(ii). The alien eventually leaves the United States and returns lawfully as a nonimmigrant. While in nonimmigrant status, a Form I-140 is approved and the alien applies for adjustment of status. Because the alien failed to maintain a lawful status for more than 180 days during her prior sojourn, she is ineligible for adjustment under section 245(c)(2) of the Act, and section 245(k) of the Act does not relieve her of this ineligibility. Under section 245(k) of the Act, the alien is still eligible for adjustment, since the prior failure to maintain status does not apply to make the alien ineligible under section 245(c) of the Act. Also, the alien did not accrue

unlawful *presence* despite the prior unlawful *status*, and so the alien is not inadmissible under section 212(a)(9)(B) of the Act.

Example 4: The alien is admitted as a lawful nonimmigrant, and, while still in status, applies for adjustment of status on the basis of an approved I-140. While the Form I-485 is pending, the alien's EAD expires, and the alien fails to apply for a new EAD. Nevertheless, the alien continues to work after the EAD expires. The period of unauthorized employment exceeds 180 days. The alien would not be inadmissible under section 212(a)(9)(B) of the Act, since the pendency of the I-485 stopped the accrual of unlawful presence. Also, there has been no "departure" to trigger section 212(a)(9)(B) of the Act. Section 245(k) of the Act does not relieve the alien of ineligibility under section 245(c)(2) of the Act since the alien engaged in unauthorized employment for more than 180 days..

An alien who is present in a lawful status will not accrue unlawful presence as long as that lawful status is maintained.

(3) **Definition of Unlawful Presence and Explanation of Related Terms**

(A) **Unlawful Presence.** Section 212(a)(9)(B)(ii) of the Act defines "unlawful presence" for purposes of sections 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I) of the Act to mean that an alien is deemed to be unlawfully present in the United States, if the alien is:

- present after the expiration of the period of stay authorized by the Secretary of Homeland Security; or
- present without being admitted or paroled.

(B) **Period of Stay Authorized (Authorized Stay).** When nonimmigrants are admitted into the United States, the period of stay authorized is generally noted on Form I-94, Admission/Departure Record. Additionally, by policy, USCIS has designated other statuses - including some that are not actually lawful - as "periods of stay authorized." Please see the more detailed analysis in sections (b) and (c), below.

(C) **Admission.** The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) (Div. C of Departments of Commerce, Justice, and State, and the Judiciary Appropriations Act of 1997, PL 104-208 (September 30, 1996)) amended section 101(a)(13) of the Act by removing the definition of the term "entry," and by replacing it with a definition of the terms "admission" and "admitted." Section 101(a)(13)(A) of the Act now defines "admission" and "admitted" as "the lawful entry of the alien into the United States after inspection and authorization by an immigration officer." See section 101(a)(13)(A) of the Act. Section 101(a)(13)(B) of the Act furthermore clarifies that parole is not admission, and that an alien crewman, who is permitted to land temporarily in the United States, shall not be considered to have been admitted. See section 101(a)(13)(B) of the Act.

(D) **Parole.** Parole is the discretionary decision, under section 212(d)(5)(A) of the Act, to permit an inadmissible alien to leave the inspection facility free of official custody, so that, although the alien is not admitted, the alien is permitted to be physically present in the United States. By statutory definition, parole is not admission. See section 101(a)(13)(B) of the Act. An alien, who has been paroled under section 212(d)(5)(A) of the Act "[is] still in theory of law at the boundary line and [has] gained no foothold in the United States." *Leng May Ma v. Barber*, 357 U.S. 185, 188-189 (1958), *quoting Kaplan v. Tod*, 267 U.S. 228 (1925).

Parole may be granted on a case-by-case basis for urgent humanitarian reasons (humanitarian parole) or for significant public benefit. See section 212(d)(5)(A) of the Act and 8 CFR 212.5. Deferred inspection and advance parole are parole, as are individual port of entry paroles and paroles authorized while a person is overseas. Section 212(a)(9)(B)(ii) of the Act makes clear that an alien, who has been paroled, does not accrue unlawful presence as long as the parole lasts. For purposes of unlawful presence, the reason for the grant of parole is irrelevant. For more information on parole pursuant to section 212(d)(5) of the Act, see chapter 54 of the *AFM*.

Only parole under section 212(d)(5)(A) of the Act qualifies as parole for purposes of section 212(a)(9) of the Act. In an April 1999 memorandum and an August 1998 legal opinion (Legal Opinion No. 98-10, August 21, 1998), former INS suggested that a release under section 236 of the Act (conditional parole) could also be considered "parole" for purposes of adjustment of status under the Cuban Adjustment Act. The Board of Immigration Appeals (BIA) has rejected this interpretation in at least one unpublished decision. See *Matter of Ortega-Cervantes*, 2005 WL 649116 (BIA, January 6, 2005). The Ninth Circuit confirmed the BIA's decision and held that release under section 236 of the Act was not "parole" for purposes of adjustment of status. See *Ortega-Cervantes v. Gonzales*, 501 F.3d 1111 (9th Cir. 2007). DHS/Office of the General Counsel reconsidered that aspect of the 1999 memorandum, and the related 1998 legal opinion. On September 28, 2007, it issued a memorandum stating that release under section 236 of the Act is not deemed to be a form of parole under section 212(d)(5) of the Act. See September 28, 2007 Memorandum, Office of the General Counsel of the Department of Homeland Security, *Clarification of the Relation Between Release Under Section 236 and Parole Under Section 212(d)(5) of the Immigration and Nationality Act*. As of the release of this *AFM* chapter, the Ninth Circuit is the only circuit that has decided this issue, although several circuits have cases outstanding. If the adjudicator encounters the issue, he or she is advised to inquire with the USCIS Office of the Chief Counsel (Adjudications Law Division) about the status of any pending litigation or further developments.

(4) General Considerations when Counting Unlawful Presence Time Under Sections 212(a)(9)(B) and 212(a)(9)(C)(i)(I) of the Act

(A) Unlawful Presence for Purposes of the 3-Year and 10-Year Bars Is Not Counted in the Aggregate. Section 212(a)(9)(B)(i) of the Act only applies to an alien, who has accrued the required amount of unlawful presence during any single stay in the United States; the length of the alien's accrued unlawful presence is not calculated by combining periods of unlawful presence accrued during multiple unlawful stays in the United States. If, during any single stay, an alien has more than one (1) period during which the alien accrues unlawful presence, the length of each period of unlawful presence is added together to determine the total period of unlawful presence time accrued during that single stay.

Reminder: The statutory provisions of the 3-year and the 10-year bars became effective on or after April 1, 1997. An alien, who was unlawfully present in the United States prior to April 1, 1997, started to accrue unlawful presence on April 1, 1997, if he or she remained present in the United States at that time. An alien, who was unlawfully present in the United States prior to April 1, 1997, but departed prior to April 1, 1997, did not accrue any unlawful presence for purposes of section 212(a)(9)(B) of the Act.

Example 1: An alien's status becomes unlawful, and the alien begins to accrue unlawful presence on April 1, 2004. On September 1, 2004 (150 days after April 1, 2004), the alien files an adjustment of status application. The alien does not accrue unlawful presence while the adjustment application is pending. See section (b)(3)(A) of this *AFM* chapter. The adjustment application is denied on October 15, 2006 (administratively final decision). After the denial, the alien continues to remain in the United States unlawfully; the accrual of unlawful presence resumes on October 16, 2006, a day after the application is denied. The alien leaves the United States on January 1, 2007. At that time, the individual had accrued unlawful presence from April 1, 2004 to September 1, 2004, and again from October 16, 2006 to January 1, 2007. The total period of unlawful presence time accrued during this single unlawful stay exceeds 180 days. By departing the United States on January 1, 2007, the alien triggered the three-year bar and is inadmissible under section 212(a)(9)(B)(i)(I) of the Act.

Example 2: An alien's status becomes unlawful, and the alien begins to accrue unlawful presence on April 1, 2004. On September 1, 2004, the alien leaves the United States. The alien returns unlawfully on October 15, 2006. He departs the United States again on January 1, 2007. Although the alien has been unlawfully present in the United States for more than 180 days in the aggregate, the unlawful presence was accrued during two (2) separate stays in the United States; during each of these stays, the alien accrued less than 180 days of unlawful presence. Thus, the alien is not inadmissible under section 212(a)(9)(B)(i)(I) of the Act.

(B) Unlawful Presence for Purposes of the Permanent Bar Is Counted in the Aggregate. Under section 212(a)(9)(C)(i)(I) of the Act, the alien's unlawful presence is counted in the aggregate, i.e. the total amount of unlawful presence time is determined by adding together all periods of time during which an alien was unlawfully present in the United States on or after April 1, 1997. Therefore, if an alien accrues a total of more than one (1) year of unlawful presence time, whether accrued during a single stay or during multiple stays, departs the United States, and subsequently reenters or attempts to reenter without admission, he or she is subject to the permanent bar of section 212(a)(9)(C)(i)(I) of the Act.

Example: An alien enters the United States unlawfully on April 1, 2004, and leaves on September 1, 2004. The alien has accrued about 150 days of unlawful presence at this time. She reenters the United States unlawfully on January 1, 2005 and stays until November 1, 2005. This time, the alien has accrued 300 days of unlawful presence. Although neither period of unlawful presence exceeds one (1) year, the aggregate period of unlawful presence does exceed one (1) year by totaling 450 days of unlawful presence, which the alien accrued during both stays. If the alien ever returns or attempts to return to the United States without being admitted, he or she will be inadmissible under section 212(a)(9)(C)(i)(I) of the Act.

(C) Specific Requirements for Inadmissibility under Section 212(a)(9)(B)(i)(I) of the Act (The 3-Year Bar). For the three-year bar to apply, the individual must have accrued at least 180 days but less than one (1) year of unlawful presence, and thereafter, must have departed voluntarily prior to the commencement of removal proceedings. Any period of unlawful presence accrued prior to April 1, 1997, does not count for purposes of section 212(a)(9)(B)(i)(I) of the Act.

The alien does not need a formal grant of voluntary departure by DHS for his or her departure to be considered voluntary. However, if DHS grants voluntary departure, the departure is still voluntary because removal proceedings have not yet commenced.

The statutory language of section 212(a)(9)(B)(i)(I) of the Act specifically requires that the alien must have departed the United States prior to the commencement of removal proceedings. Removal proceedings commence with the filing of the Notice to Appear (NTA) with the immigration court following service of the NTA on the alien. See 8 CFR 1003.14. An alien, who departs the United States after the NTA has been filed with the immigration court, therefore, is not subject to the three-year bar according to the statutory language. To avoid future inadmissibility, however, the alien must leave before he or she has accrued more than one year of unlawful presence, and becomes inadmissible under section 212(a)(9)(B)(i)(II) of the Act, rather than section 212(a)(9)(A)(i)(I) of the Act. This provision provides the alien with an incentive to end his or her unlawful presence by leaving the United States, rather than contesting removal.

The burden is on the applicant to establish that the NTA had already been filed by the time the applicant had departed. The record of proceedings before the immigration court will generally indicate when the NTA was actually filed, and the filing date shown in the court's record will be controlling.

Even if the applicant is not subject to the three-year or the ten-year bar, there may be other grounds of inadmissibility that apply based on the fact that the removal proceedings were initiated and the alien departed the United States during the proceedings. For example, a conviction that made the alien subject to removal as a deportable alien may also make the alien inadmissible.

(D) Specific Requirements for Inadmissibility under Section 212(a)(9)(B)(i)(II) of the Act (The 10-Year Bar). An alien, who voluntarily departs the United States or who was removed from the United States after having been unlawfully present for more than one (1) year, triggers the 10-year bar to admission under section 212(a)(9)(B)(i)(II) of the Act. Any period of unlawful presence accrued prior to April 1, 1997 does not count for purposes of section 212(a)(9)(B)(i)(II) of the Act.

Unlike the 3-year bar, the 10-year bar applies even if the alien leaves after removal proceedings have commenced; the individual will be inadmissible, even if he or she leaves after the NTA has been filed with the immigration court. Moreover, filing the NTA does not stop the accrual of unlawful presence. 8 CFR 239.3.

(E) Specific Requirements for Inadmissibility under Section 212(a)(9)(C)(i)(I) of the Act (The Permanent Bar)

(i) **General Requirements**. To be permanently inadmissible under section 212(a)(9)(C)(i)(I) of the Act, an alien must have accrued more than one (1) year of unlawful presence in the aggregate, must have left the United States thereafter, and must then have entered or attempted to reenter the United States without being admitted. Any unlawful presence accrued prior to April 1, 1997, or any unlawful entry or attempted reentry into the United States prior to April 1, 1997, does not count for purposes of inadmissibility under section 212(a)(9)(C)(i)(I) of the Act.

(ii) **Special Note On the Effect of An Alien's Entry on Parole After Having Accrued More Than One (1) Year Of Unlawful Presence**

Is an alien, who had accrued more than one (1) year of unlawful presence, and who is paroled into the United States but not admitted, subject to section 212(a)(9)(C)(i)(I) of the Act?

An alien's inadmissibility under section 212(a)(9)(C)(i)(I) of the Act is fixed at the time of the alien's unlawful entry or attempted reentry.

An alien who had accrued more than one (1) year of unlawful presence, and who has *never* returned or attempted to return without admission after that unlawful presence, and who is paroled into the United States pursuant to section 212(d)(5) of the Act, but not admitted, is not subject to inadmissibility under section 212(a)(9)(C)(i)(I) of the Act. It is the Department of Homeland Security's (DHS) policy that for purposes of section 212(a)(9)(C)(i)(I) inadmissibility, an alien's parole is not deemed to be an "entry or attempted reentry without being admitted," even though parole is not considered admission. See section 101(a)(13)(B) and section 212(d)(5)(A) of the Act. This conclusion reflects the legal principle that, although a parolee is actually allowed to physically enter the United States, a parolee is deemed to be at a port of entry, pending a final decision on whether to admit the alien or not. See *Leng May Ma v. Barber*, 357 U.S. 185, 188-189 (1958), *quoting Kaplan v. Tod*, 267 U.S. 228 (1925).

As noted, however, an alien's inadmissibility for returning unlawfully after accruing sufficient unlawful presence is fixed at the time of the alien's unlawful return or attempt to return. Paroling an alien who is already inadmissible does not relieve the alien of inadmissibility. For example, if an alien who is already present in the United States without being admitted because he or she entered without inspection, and who, in the past, had accumulated unlawful presence in excess of one (1) year, is taken into custody, and then later paroled pursuant to section 212(d)(5) of the Act, the alien's parole would not relieve the alien of inadmissibility under section 212(a)(9)(C)(i) of the Act.

For a more detailed explanation and examples, please see (a)(6)(B) of this subsection, below.

(5) Triggering the Bar by Departing the United States

An alien must leave the United States after accruing more than 180 days or one (1) year of unlawful presence in order to trigger the 3-year or 10-year bar to admission under section 212(a)(9)(B) of the Act. This includes departures made while traveling after having approved advance parole or with a valid refugee travel document. See section (a)(6) of this chapter.

Note: By granting advance parole or a refugee travel document, USCIS does not authorize the alien's departure from the United States; it merely provides a means for the alien to return to the United States, regardless of admissibility. Therefore, even if the alien has an advance parole document, the alien's actual departure from the United States will still trigger the bar to inadmissibility under section 212(a)(9)(B) of the Act.

Section 212(a)(9)(C)(i)(I) of the Act does not explicitly mention "departure" as a prerequisite for the bar to apply. However, according to the wording of the statute, an alien with the requisite period of unlawful presence must "enter or attempt to enter without admission" in order to incur inadmissibility. Thus, the alien cannot violate the provision unless the alien leaves the United States and then returns or attempts to

return. See *Matter of Rodarte-Roman*, 23 I&N Dec. 905 (BIA 2006)(Departure triggers the bars; the IJ erred when denying adjustment of status because of the individual's accrual of unlawful presence in excess of one (1) year without departure.).

(6) Triggering the 3-Year and the 10-Year Bars But Not the Permanent Bar When Departing with Advance Parole or with a Refugee Travel Document

(A) Travel on Advance Parole Issued to Applicants for Adjustment of Status on Form I-512, Authorization For Parole Of An Alien Into The United States, pursuant to 8 CFR 212.5(f) and 8 CFR 245.2(a)(4). An alien with a pending adjustment of status application, who has accrued more than 180 days of unlawful presence time, will trigger the bars to admission, if he or she travels outside the United States subsequent to the issuance of an advance parole document. When the alien presents the advance parole document at a port of entry, he or she may be permitted to return to the United States as a parolee because aliens who request parole into the United States are not required to establish admissibility under section 212(a) of the Act. However, the fact that the alien is permitted to return to the United States as a parolee does not confer a waiver of inadmissibility under section 212(a)(9)(B)(i)(I) and (II) of the Act. Consequently, a waiver under section 212(a)(9)(B)(v) of the Act would be required when determining the alien's eligibility to adjust status to lawful permanent residence.

(B) A Special Note on the Effect on Section 212(a)(9)(C) of the Act of an Alien's Entry on Parole After Having Accrued More Than One (1) Year Of Unlawful Presence. Parole is not admission. See section 101(a)(13)(B) of the Act. An individual is subject to section 212(a)(9)(C)(i)(I) of the Act, if he or she has accrued more than one (1) year of unlawful presence in the United States during a single stay or during multiple stays, who departs, and subsequently enters or attempts to reenter "without being admitted." The statutory language omits the word "parole" and makes it unclear whether an alien, who enters on parole, triggers the bar to inadmissibility under section 212(a)(9)(C) of the Act. Therefore, if an alien is paroled into the United States pursuant to section 212(d)(5)(A) of the Act after having accrued more than one (1) year of unlawful presence, is he or she inadmissible under section 212(a)(9)(C)(i)(I) of the Act because the alien was not "admitted"? The answer is "no" for the following reason:

An alien's inadmissibility pursuant to section 212(a)(9)(C)(i)(I) of the Act is fixed as of the date of the alien's entry or attempted reentry without being admitted. If an alien, who has accrued unlawful presence in excess of one (1) year, came to a port of entry and applied for admission to the United States or asked to be paroled into the United States, the alien will not be deemed to have attempted to enter the United States without "being admitted," if DHS actually paroles the alien. The significant point is that the alien will have arrived at a port of entry and presented himself or herself for inspection. If the alien is paroled, the alien will continue to be considered an applicant for admission, and so cannot be said to have entered or attempted to enter without admission. Thus, if DHS paroles the alien under section 212(d)(5) of the Act, the alien's departure and subsequent return as a parolee does not trigger the section 212(a)(9)(C)(i)(I)-bar for

purposes of a subsequent admissibility determination by DHS (such as at the time of the adjustment of status adjudication). This conclusion reflects the legal principle that, although a parolee is actually allowed to physically enter the United States, a parolee is deemed to be at a port of entry, pending a final decision on whether to admit the alien or not. See *Leng May Ma v. Barber*, 357 U.S. 185, 188-189 (1958), quoting *Kaplan v. Tod*, 267 U.S. 228 (1925).

Example: An alien enters the United States on a B visa. The status expires on January 1, 2000. On January 2, 2000, the individual commences to accrue unlawful presence as having overstayed his or her period of admission. The alien applies for adjustment of status on January 1, 2005. The individual is in authorized stay during the pendency of the adjustment of status application and does not accrue unlawful presence. See section (b)(3)(A) of this *AFM* chapter. Based on the pending adjustment application, the alien applies for advance parole (Form I-131), which is approved. The alien then leaves the United States on April 1, 2005; at this time, the alien has triggered the 10-year bar to admission to the United States because the alien had accrued unlawful presence in excess of one (1) year (from January 2, 2000, to January 1, 2005). On April 15, 2005, the alien returns to the United States through a port of entry, presents his advance parole document, and is paroled into the United States. The alien will not be considered to have triggered inadmissibility under section 212(a)(9)(C)(i)(I) of the Act. Because the alien is currently a parolee, the alien is deemed to still be at the port of entry. At the time of the adjudication of the adjustment of status application, the alien's request for admission (through the adjustment of status application) will be decided. Thus, the individual is a parolee, he or she is not deemed to have "entered or attempted to reenter without being admitted." (Note: The alien still may be inadmissible under section 212(a)(9)(B) of the Act at the time of the adjustment of status application.)

By contrast, the parole of an alien after the alien had already become inadmissible under section 212(a)(9)(C)(i) would not relieve the alien of inadmissibility under section 212(a)(9)(C)(i) of the Act.

Example: An alien enters the United States on a B visa. The status expires on January 1, 2000. On January 1, 2000, the alien commences to accrue unlawful presence for having overstayed his or her period of admission. The alien applies for adjustment of status on January 1, 2005. The alien departs the United States and returns illegally by crossing the border 30 miles west of the nearest port of entry on April 15, 2005. The alien is now inadmissible under section 212(a)(9)(C)(i)(I) of the Act. (An additional consequence, unrelated to the illegal entry, is that the alien also abandoned his or her adjustment application). Even if the alien were later taken into custody and paroled under section 212(d)(5) of the Act, or were to *later* travel and return on a grant of advance parole, the alien would remain inadmissible under section 212(a)(9)(C)(i)(I) of the Act since the

alien did, in fact, enter without admission after having accrued the requisite period of unlawful presence.

The instructions to Form I-131, Application for Travel Document, and Form I-485, Application to Register Permanent Residence or Adjust Status, as well as the standard Form I-512, Authorization for Parole of an Alien into the United States, include language warning the alien that traveling abroad and returning to the United States by using Form I-512 may make the alien inadmissible under section 212(a)(9)(B) of the Act.

(C) Travel on a Valid Refugee Travel Document Issued pursuant to Section 208(c)(1)(C) of the Act and 8 CFR 223. An asylee who had accrued more than 180 days of unlawful presence time prior to having filed the bona fide asylum application, will trigger the bar to admission, if he or she departs the United States while traveling on a valid refugee travel document. When the asylee presents the travel document at a port of entry, he or she can be permitted to reenter the United States to resume status as an asylee; however, the asylee will be inadmissible when he or she applies to adjust status to lawful permanent resident, and a waiver would be required at that time.

(7) Multiple Grounds of Inadmissibility and the Relationship Between Sections 212(a)(9)(B)(i)(I), (B)(i)(II), and (C)(i)(I) of the Act

Sections 212(a)(9)(B)(i)(I), (B)(i)(II), and (C)(i)(I) of the Act establish different grounds of inadmissibility based on prior unlawful presence. Whether a specific ground applies to an alien depends on an analysis of the facts of the person's case in light of that specific ground.

It is possible that the alien's immigration history makes the alien inadmissible under *both* section 212(a)(9)(B) of the Act and section 212(a)(9)(C)(i)(I) of the Act.

Example: An alien with more than one (1) year of unlawful presence leaves the United States, thus triggering the 10-year bar to admissibility under section 212(a)(9)(B)(i)(II) of the Act. Three (3) years after the alien's last departure, the alien returns to the United States and enters illegally, thus without having been admitted. The alien is now inadmissible under sections 212(a)(9)(B)(i)(II) and 212(a)(9)(C)(i)(I) of the Act.

Also, an alien with sufficient unlawful presence who is removed from the United States, may be inadmissible under section 212(a)(9)(A), as well as section 212(a)(9)(B)(i)(II) and/or section 212(a)(9)(C)(i) of the Act depending on the circumstances of the individual case.

(8) Benefits That May Be Available Despite Inadmissibility under Section 212(a)(9)(B)(i)(I), (B)(i)(II), or (C)(i)(I) of the Act

Section (c) of this chapter specifies forms of relief from inadmissibility under sections 212(a)(9)(B)(i)(I), (B)(i)(II), and (C)(i)(I) of the Act ("Waivers"). Even without a grant of a waiver, aliens who are subject to these grounds of inadmissibility, may still obtain certain benefits as outlined below in (b)(2) and (b)(3), if otherwise eligible.

(A) Under Section 212(a)(9)(B)(i)(I) or (II) of the Act. An alien, who is inadmissible under section 212(a)(9)(B)(i) of the Act may apply for and receive, if eligible, a grant of:

- Registry under section 249 of the Act;
- Adjustment of status under section 202 of NACARA;
- Adjustment of status under section 902 of HRIFA;
- Adjustment of status under section 245(h)(2)(A) of the Act;
- Change to V nonimmigrant status under 8 CFR 214.15 (but the alien may need a waiver to obtain adjustment of status to LPR after having acquired V nonimmigrant status);
- LPR status pursuant to the LIFE Legalization Provision: A Legalization applicant under section 1104 of the LIFE Act may travel with authorization during the pendency of the application without triggering inadmissibility under section 212(a)(9)(B) of the Act. See 8 CFR 245a.13(e)(5).

(B) Under Section 212(a)(9)(C)(i)(I) of the Act. An alien who is inadmissible under section 212(a)(9)(C)(i)(I) of the Act may apply for and receive, if eligible, a grant of:

- Registry under section 249 of the Act.

(C) Special Concerns Regarding Section 245(i) - Applications. The USCIS position is that inadmissibility under section 212(a)(9)(B) or (C) of the Act makes an alien ineligible for adjustment of status under section 245 of the Act, regardless of whether the alien applies under section 245(a) or section 245(i) of the Act. The BIA has endorsed this view. In *Matter of Briones*, 24 I&N Dec. 355 (BIA 2007), the Board held that an alien who is inadmissible under section 212(a)(9)(C)(i)(I) of the Act is not eligible for adjustment under section 245(i) of the Act. An alien who is inadmissible under section 212(a)(9)(B) of the Act is also ineligible for section 245(i) adjustment. *Matter of Lemus*, 24 I&N Dec. 373 (BIA 2007).

USCIS adjudicators will follow *Matter of Briones* and *Matter of Lemus* in all cases, regardless of the decisions of the 9th Circuit in *Acosta v. Gonzales*, 439 F.3d 550 (9th Cir. 2006) or of the 10th Circuit in *Padilla-Caldera v. Gonzales*, 453 F.3d 1237 (10th Cir. 2005). Following these Board cases, rather than *Acosta* and *Padilla-Caldera*, will allow the Board to reexamine the continued validity of these court decisions.

USCIS adjudicators should also be aware that the 9th Circuit has held that the Board's decision in *Matter of Torres-Garcia*, 23 I&N Dec. 866 (BIA 2006) is entitled to judicial

deference, and that the decision in *Perez-Gonzales v. Ashcroft*, 379 F.3d 783 (9th Cir. 2004), is no longer good law. *Gonzales v. Department of Homeland Security*, 508 F.3d 1227 (9th Cir. 2007).

(9) Effective Date of Sections 212(a)(9)(B) and (C)(i)(I) of the Act

(A) **Effective Date.** Only periods of unlawful presence spent in the United States after the April 1, 1997, effective date of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (Div. C of Departments of Commerce, Justice, and State, and the Judiciary Appropriations Act of 1997, PL 104-208 (September 30, 1996))(IIRIRA), count towards unlawful presence for purposes of section 212(a)(9)(B) and (C)(i)(I) of the Act.

For purposes of section 212(a)(9)(C)(i)(I) of the Act, one (1) full year of unlawful presence must have accrued. Therefore, the earliest an individual could have been subjected to this ground of inadmissibility was April 2, 1998.

(B) **The Child Status Protection Act and Its Influence on Unlawful Presence.** On August 6, 2002, the Child Status Protection Act (CSPA) (PL 107-208, August 6, 2002) was enacted to provide relief to certain children, who “aged-out” during the processing of certain applications. The CSPA applies to derivative children of asylum and refugee applicants, children of United States citizens, children of Lawful Permanent Residents (LPRs), and derivative beneficiaries of family-based, employment-based, and diversity visas. The CSPA changes how a child’s age should be calculated for purposes of eligibility for certain immigration benefits; it does not change the definition of “child” pursuant to section 101(b)(1) of the Act.

The CSPA was effective on August 6, 2002. In general, its provisions are not retroactive: Any qualified petition or application that was pending on the effective date is subject to the provisions of the CSPA. For detailed information, please consult the policy memorandum, Domestic Operations, April 30, 2008, Revised Guidance for the Child Status Protection Act (AD07-04), or AFM Chapter 21.2(e).

Calculation of Unlawful Presence, if the CSPA Is Applicable: Any derivative beneficiary child who is in a “period of stay authorized” because of a pending application or petition, does not accrue unlawful presence merely because of his or her “aging-out,” if the requirements and conditions of the CSPA are met. For more information about the applicability of the CSPA, see AFM sections describing individual types of immigration benefits and Chapter 21.2(e).

The CSPA applies only to those benefits expressly specified by the statute. Nothing in the CSPA provides protection for nonimmigrant visa holders (such as K or V nonimmigrants), or to NACARA, HRIFA, Family Unity, Cuban Adjustment Act, and Special Immigrant Juvenile Applicants, and/or derivatives. However, there may be

limited coverage for K-2 and K-4 individuals. See Chapter 21.2(e). This list is not exhaustive.

(b) Determining When an Alien Accrues Unlawful Presence

(1) Aliens Present in Lawful Status or as Parolees

An alien does not accrue unlawful presence, if he or she is present in the United States under a period of stay authorized by the Secretary of Homeland Security, or if he or she has been inspected and paroled into the United States and the parole is still in effect.

An alien who is present in the United States without inspection accrues unlawful presence from the date of the unlawful arrival, unless the alien is protected from the accrual of unlawful presence as described in this *AFM* chapter. Note that an alien, who arrived at a port of entry and obtained permission to come into the United States by making a knowingly false claim to be a citizen, is present in the United States without having been inspected and admitted. See *Matter of S--*, 9 I&N Dec. 599 (BIA 1962).

(A) **Lawful Permanent Residents (LPRs)**. An alien lawfully admitted for permanent residence will not accrue unlawful presence unless the alien becomes subject to an administratively final order of removal by the IJ or the BIA (which means that during the course of proceedings, the alien was found to have lost his or her LPR status), or if he or she is otherwise protected from the accrual of unlawful presence. Unlawful presence will start to accrue the day after the order becomes administratively final, and not on the date of the event that made the alien subject to removal.

(B) **Lawful Temporary Residents (Section 245A(b) of the Act and 8 CFR 245a)**. A lawful temporary resident must file an application to adjust from temporary to permanent resident status before the beginning of the 43rd month from the date he or she was granted lawful temporary resident status. See 8 CFR 245a.3(a)(2). However, unlike conditional permanent residents, the status of a lawful temporary resident does not automatically terminate, if the alien fails to file a timely application, and the DHS needs to advise the alien of its intent to terminate his or her Temporary Residence Status. See section 245A(b)(2) of the Act, and 8 CFR 245a.2(u)(2). The same procedures apply, if the alien's status is terminated for the reasons specified in section 245A(b)(2) of the Act. Lawful Temporary Resident status also terminates upon the entry of a final order of deportation, exclusion, or removal. See 8 CFR 245.2(u)(2).

If the DHS advises the alien of its intent to terminate lawful temporary resident status, the alien continues to be a lawful temporary resident and does not accrue unlawful presence until a notice of termination is issued. If the termination is appealed, the period of authorized stay continues through the administrative appeals process. The termination of an alien's lawful temporary resident status cannot be reviewed in removal proceedings before an immigration judge. The alien would accrue unlawful presence

time during removal proceedings or while a petition for review is pending in Federal court.

(C) Conditional Permanent Residents under Sections 216 and 216A of the Act

(i) Termination upon the Entry of an Administratively Final Order of Removal. As is the case with other LPRs, an alien lawfully admitted for permanent residence on a conditional basis under section 216 or 216A of the Act begins to accrue unlawful presence upon the entry of an administratively final order of removal. A conditional LPR will also accrue unlawful presence before the entry of an administratively final removal order, if USCIS terminates the alien's conditional LPR status, as described below.

(ii) Automatic Termination. Pursuant to section 216 or section 216A of the Act, an alien, who was granted conditional permanent resident status must properly file a petition to remove the conditions placed on his or her status within the 90-day period immediately preceding the second anniversary of the date on which lawful permanent resident status on a conditional basis was granted. See Sections 216(c)(1) and 216A(c)(1) of the Act. The petition is filed on Form I-751, Petition to Remove Conditions of Residence, or on Form I-829, Petition by Entrepreneur to Remove Conditions. See 8 CFR 216.4 and 8 CFR 216.6. Failure to do so results in the automatic termination of conditional resident status and the initiation of removal proceedings at the expiration of the 90-day period, unless the parties can establish good cause for failure to file the petition. See section 216(c)(2) and 8 CFR 216.4(a)(6); section 216A(c)(2) and 8 CFR 216.6(a)(5); section 216(c)(4) and 8 CFR 216.5. The alien begins to accrue unlawful presence as of the date of the second anniversary of the alien's lawful admission for permanent residence. See *id.* Also, failure to appear for the personal interview that may be required by USCIS in relation to the I-751 or I-829 petition results in the automatic termination of the conditional legal permanent resident status, unless the parties establish good cause for the failure to appear. See section 216(c)(2)(A) of the Act and 8 CFR 216.4(b)(3); section 216A(c)(2)(A) of the Act and 8 CFR 216.6(b)(3).

(iii) Late Filings of the Petition to Remove the Conditional Basis Of LPR Status by the Alien. Current regulations at 8 CFR 216.4(a)(6) and 8 CFR 216.6(a)(5) allow a conditional resident to submit a late filing to USCIS, if jurisdiction has not yet vested with the immigration judge, and if certain requirements are met. If the late filed petition is accepted and approved, no unlawful presence time will be deemed to have accrued. If jurisdiction has already vested with the immigration judge, the judge may terminate removal proceedings upon joint motion by the alien and DHS. Consequently, if a late filing is accepted and approved while the alien is in proceedings, the alien will not accrue unlawful presence time. If, however, the late filing is rejected, the alien begins to accrue unlawful presence time on the date his or her status as a conditional resident automatically terminated.

(iv) Termination on Notice. If the DHS advises the alien of its intent to terminate conditional permanent resident status, the alien continues to be a conditional permanent resident and does not accrue unlawful presence until a notice of termination is issued. The alien begins to accrue unlawful presence on the day after the notice of termination is issued, unless the alien seeks review of the termination in removal proceedings. See 8 CFR 216.3.

(v) Review in Removal Proceedings. If the alien seeks review of the termination in removal proceedings, DHS bears the burden of proving that the termination was proper. Thus, the alien will be deemed not to accrue unlawful presence unless the immigration judge affirms the termination. See 8 CFR 216.3. If the immigration judge affirms the termination, the alien will begin to accrue unlawful presence on the day after the immigration judge's removal order becomes administratively final.

(D) Aliens Granted Cancellation of Removal or Suspension of Deportation.

Section 240A of the Act provides for two (2) different types of cancellation of removal: cancellation of removal for an alien who has been admitted for permanent residence (section 240A(a) of the Act), and cancellation of removal and adjustment of status for certain aliens who have been present in the United States for a period of not less than ten (10) years (section 240A(b) of the Act). Therefore, the effect of a grant of cancellation of removal on the accrual of unlawful presence (or of suspension of deportation under former section 244 of the Act) depends on the alien's status immediately before relief was granted, and as outlined below:

- If an alien who has already acquired LPR status becomes subject to removal but applies for and receives a grant of cancellation of removal under section 240A(a) of the Act, or a grant of suspension of deportation under former section 244 of the Act, the alien retains his or her LPR status. No period of unlawful presence will have accrued because the grant of cancellation or suspension prevents the loss of LPR status.
- If an alien who is not already an LPR obtains a grant of cancellation of removal under section 240A(b) of the Act, or a grant of suspension of deportation under former section 244 of the Act, the alien becomes an alien lawfully admitted for permanent residence as of the date of the final decision granting relief. As such, the alien will no longer accrue unlawful presence after cancellation of removal or suspension of deportation is granted. Moreover, given the special nature of these forms of relief, any unlawful presence that may have accrued before the grant of cancellation of removal or suspension of deportation will be eliminated for purposes of any future application for admission.

Example: An alien had accrued ten (10) years of unlawful presence in the United States, and is subsequently granted cancellation of removal. The

alien is now an LPR. If, after becoming an LPR, the alien travels abroad and returns to the United States through a port of entry, none of the pre-grant unlawful presence will be considered in determining the alien's admissibility. Section 212(a)(9)(B)(i) of the Act does not apply to LPRs.

(E) **Lawful Nonimmigrants**. The period of authorized stay for a nonimmigrant may end on a specific date or may continue for "duration of status (D/S)." Under current USCIS policy, nonimmigrants begin to accrue unlawful presence as follows:

(i) **Nonimmigrants Admitted until a Specific Date (Date Certain)**. Nonimmigrants admitted until a specific date will generally begin to accrue unlawful presence the day following the date the authorized period of admission expires, as noted on Form I-94, Arrival/Departure Record. If USCIS finds, during the adjudication of a request for immigration benefit, that the alien has violated his or her nonimmigrant status, unlawful presence will begin to accrue either the day after Form I-94 expires or the day after USCIS denies the request, whichever is earlier. If an immigration judge makes a determination of nonimmigrant status violation in exclusion, deportation or removal proceedings, unlawful presence begins to accrue the day after the immigration judge's order or the day after the Form I-94 expired, whichever is earlier. It must be emphasized that the accrual of unlawful presence neither begins on the date that a status violation occurs, nor on the day on which removal proceedings are initiated. Removal proceedings have no impact on whether an individual is accruing unlawful presence. See 8 CFR 239.3.

Example: An individual is admitted in H-1B status until September 20, 2007, as evidenced on Form I-94, Arrival/Departure Record. On January 1, 2007, an NTA is issued and the individual is placed in removal proceedings. The individual will not start to accrue unlawful presence unless the immigration judge holds that the alien had violated his or her nonimmigrant status, or until his or her Form I-94 expires, whichever is earlier.

(ii) **Nonimmigrants Admitted for Duration of Status (D/S)**. If USCIS finds a nonimmigrant status violation while adjudicating a request for an immigration benefit, unlawful presence will begin to accrue on the day after the request is denied. If an immigration judge makes a determination of nonimmigrant status violation in exclusion, deportation, or removal proceedings, unlawful presence begins to accrue the day after the immigration judge's order. It must be emphasized that the accrual of unlawful presence neither begins on the date that a status violation occurs, nor on the day on which removal proceedings are initiated. See 8 CFR 239.3.

(iii) **Non-controlled Nonimmigrants (e.g. Canadian B-1/B-2)**. Nonimmigrants, who are not issued a Form I-94, Arrival/Departure Record, are treated as nonimmigrants admitted for D/S for purposes of determining unlawful presence.

(F) Other Types of Lawful Status

(i) Aliens in Refugee Status. In general, the period of authorized stay begins on the date the alien is admitted to the United States in refugee status. If refugee status is terminated, unlawful presence will start to accrue the day after the refugee status is terminated.

If the individual is a derivative refugee, either by accompanying or by following to join the principal, the alien will commence to accrue unlawful presence as follows:

- If the derivative refugee is outside the United States: The period of stay authorized begins on the date the alien either enters as an accompanying or following-to-join refugee pursuant to section 207(c)(2) of the Act and 8 CFR 207.7.
- If the derivative refugee is inside the United States: The accrual of unlawful presence ceases when USCIS accepts the filing of a bona fide Asylee/Refugee Relative Petition (Form I-730) on the individual's behalf. USCIS interprets the language of section 212(a)(9)(B)(iii)(II) of the Act to apply to refugees and asylees alike. Therefore, once the bona fide Form I-730 petition is filed on behalf of the individual, the individual will be protected from the accrual of unlawful presence. No period of time during which the bona fide petition is pending shall be taken into account in determining the period of unlawful presence. If the petition is subsequently denied, the individual will again begin to accrue unlawful presence, if the individual has previously accrued unlawful presence.
- Because filing a Form I-730 stops the accrual of unlawful presence, but does not cure any unlawful presence that has already accrued, an individual who departs the United States during the pendency of the petition, with or without advance parole, will trigger the 3-year or the 10-year bar. In this case and because an individual seeking refugee status has to be admissible as an immigrant pursuant to section 207 of the Act, the individual will be required to file Form I-602, Application by Refugee For Waiver of Grounds of Excludability, to overcome the bars to admissibility before the Asylee/Refugee Relative Petition can be approved. If the alien is not permitted to reenter the United States, the individual will have to seek the waiver through the U.S. consulate where the approved I-730 is processed.

(ii) Aliens Granted Asylum. The period of authorized stay begins on the date the alien files a bona fide application for asylum. See section 212(a)(9)(B)(iii)(II) of the Act; see *also* section (b)(2)(B) of this chapter. This includes aliens, who entered the United States illegally but who were subsequently granted asylum. If asylum status is terminated, unlawful presence starts to accrue the day after the date of termination. A grant of asylum does not eliminate any prior periods of unlawful presence.

An individual who is included in the principal's asylum application (Form I-589) as a derivative beneficiary is in a period of stay authorized as of the date the principal

applicant is in a period of stay authorized (unless he or she works without authorization or it is deemed that the application for the derivative individual is not bona fide). However, if it is determined that the asylum application is not bona fide for reasons other than the ones to be attributed to the derivative beneficiary, the individual is in a period of stay authorized until the determination is made that the application by the principal was not bona fide. Also, if the principal works without authorization, the derivative beneficiary only commences to accrue unlawful presence at the time the determination is made that the principal had worked without authorization.

Finally, a derivative beneficiary, who is physically present in the United States, but who was not included on the asylum application, is protected from the accrual of unlawful presence once the qualifying asylee files an Asylee/Refugee Relative Petition on behalf of the individual. DHS interprets the language of section 212(a)(9)(B)(iii)(II) of the Act to apply to all applicants for asylum, including derivative beneficiaries, who obtain their status through an Asylee/Refugee Relative Petition.

(iii) Aliens Granted Temporary Protected Status (TPS) pursuant to Section 244 of the Act. If an alien's TPS application has been granted, the alien is deemed to be in lawful nonimmigrant status for the duration of the grant. See section 244(f) of the Act. Please see (b)(3)(G) of this section of this *AFM* chapter for the effect of a violation of TPS status on the accrual of unlawful presence, and for the effect of a pending TPS application on the accrual of unlawful presence.

If an alien is granted TPS, he or she is, while the grant is in effect, deemed to be in lawful nonimmigrant status for purposes of adjustment of status and change of status according to section 244(f) of the Act.

A grant of TPS does not, however, cure any unlawful presence that may have accrued before the grant of TPS. If the alien was present without inspection and admission or parole, the alien remains an alien who has not been inspected and admitted or paroled, despite the grant of TPS. See INS General Counsel Opinion, 91-27, March 4, 1991. Therefore, if before TPS is granted, the applicant had previously accrued unlawful presence sufficient to trigger the bars, and the applicant travels outside the United States after having obtained advance parole, his or her departure triggers the bars for purposes of an adjustment of change of status application; that is, the individual may be ineligible to adjust despite the wording of section 244(f) of the Act, and depending on the basis upon which the alien seeks adjustment. Also, if a waiver was granted for inadmissibility under section 212(a)(9)(B) or (C) of the Act for purposes of the TPS application, the alien is still inadmissible for purposes of adjustment of status because the standard of the waiver granted for TPS status is different than the one granted in relation to an immigrant benefits application (although both are filed on Form I-601, Application for Waiver of Grounds of Inadmissibility).

(G) Aliens Present as Parolees. Section 212(a)(9)(B)(ii) of the Act makes clear that an alien, who has been paroled, does not accrue unlawful presence as long as the parole lasts. For purposes of the accrual of unlawful presence, the specific type of parole and the reasons for the grant of parole do not matter; however, conditional parole pursuant to section 236 of the Act cannot be considered parole for purposes of section 212(a)(9)(B)(ii) of the Act. See section 40.9.1(a)(3)(D) of this *AFM* chapter.

An alien, who has been paroled into the United States does, however, begin to accrue unlawful presence as follows:

When a parolee remains in the United States beyond the period of parole authorization, unlawful presence begins to accrue the day following the expiration of the parole authorization.

Example: The alien's parole expires January 1, 2007, and the alien does not depart. January 2, 2007 will be the alien's first day of unlawful presence.

If the parole authorization is revoked or terminated prior to its expiration date, unlawful presence begins to accrue the day after the revocation or termination.

An alien paroled for the purpose of removal proceedings will begin to accrue unlawful presence the day after the date the removal order becomes administratively final, or unless the alien is otherwise protected from the accrual of unlawful presence.

(2) Aliens Present in Unlawful Status Who Do not Accrue Unlawful Presence by Statute for Purposes of Section 212(a)(9)(B) of the Act (Statutory Exceptions)

As noted in section (a)(2) of this *AFM* chapter, an alien must be in the United States in an unlawful status in order to accrue unlawful presence; however, there are some situations in which unlawful presence does not accrue despite unlawful status. The alien may be protected from accruing unlawful presence by section 212(a)(9)(B) of the Act itself, or by USCIS policy. This section (b)(2) deals with individuals, who are actually in unlawful status but who, by statute, do not accrue unlawful presence for purposes of section 212(a)(9)(B) of the Act.

The exceptions listed in this section (b)(2) apply *only* to grounds of inadmissibility listed in section 212(a)(9)(B) of the Act, and *do not* apply for purposes of inadmissibility under section 212(a)(9)(C) of the Act. There are two reasons for this conclusion: 1) The terms of sections 212(a)(9)(B)(iii) and (iv) of the Act refer *only* to specific subsections of section 212(a)(9)(B)(i) of the Act; and 2) Inadmissibility under section 212(a)(9)(C)(i)(I) of the Act rests on a more serious immigration violation than simple unlawful presence: To be inadmissible under section 212(a)(9)(C)(i)(I) of the Act, the alien must not only have accrued sufficient unlawful presence but also returned or attempted to return to

the United States without admission. Since the precise language of sections 212(a)(9)(B)(iii) and (iv) of the Act clearly make them apply only to inadmissibility under section 212(a)(9)(B) of the Act and not to inadmissibility under section 212(a)(9)(C)(i)(I) of the Act, and because violations of section 212(a)(9)(C)(i)(I) of the Act are more culpable than mere unlawful presence, USCIS has concluded that these statutory exceptions do not apply to section 212(a)(9)(C)(i)(I) cases. See June 17, 1997, Office of Programs memorandum – *Additional Guidance for Implementing Sections 212(a)(6) and 212(a)(9) of the Immigration and Nationality Act (Act)*; see also Section (b)(3) below for the same remark.

(A) **Minors Who Are under 18 Years of Age.** An alien whose unlawful status begins before his or her 18th birthday does not begin to accrue unlawful presence for purposes of section 212(a)(9)(B) of the Act until the day after his or her 18th birthday pursuant to section 212(a)(9)(B)(iii)(I) of the Act.

(B) Aliens with Pending Asylum Applications (Including Children Aging Out and Dependents of Asylum Applicants)

(i) **Principal Applicant.** An alien, whose bona fide application for asylum is pending, is in an authorized period of stay and does not accrue unlawful presence for purposes of section 212(a)(9)(B) of the Act unless the alien is employed without authorization while the application is pending. See section 212(a)(9)(B)(iii)(II) of the Act. It does not matter whether the application is or was filed affirmatively or defensively.

DHS has interpreted the phrase “bona fide asylum application” to mean a properly filed asylum application that has a reasonably arguable basis in fact or law, and is not frivolous. If this is the case, unlawful presence does not accrue while the application is pending unless the alien engages in unauthorized employment. DHS considers the application for asylum to be pending during any administrative or judicial review (including review in Federal court).

A denial of an asylum claim is not determinative of whether the claim was bona fide for purposes of section 212(a)(9)(B)(iii)(II) of the Act. Similarly, the abandonment of an application for asylum does not mean that the application was not bona fide. The Asylum Division within the Refugee, Asylum, and International Operations Directorate at USCIS' HQ can provide guidance regarding whether a filing of an asylum application can be deemed “bona fide” based on the specific facts of the case and should be contacted, if there are any questions as to the determination.

(ii) **Dependents in General.**

An individual who is included in the principal's asylum application (Form I-589) as a derivative beneficiary is in a period of stay authorized as of the date the principal applicant is in a period of stay authorized (unless he or she works without authorization or it is deemed that the application for the derivative individual is not bona fide).

However, if it is determined that the asylum application is not bona fide for reasons other than the ones to be attributed to the dependent, the individual is in a period of stay authorized, for example until the determination is made that the application was not bona fide. Also, if the principal works without authorization, the derivative beneficiary only commences to accrue unlawful presence at the time the determination is made that the principal had worked without authorization.

A dependent's asylum case is no longer considered pending if the principal asylum applicant notifies USCIS that the dependent is no longer part of the principal's application, or if USCIS determines that the dependent relationship no longer exists (for example because of divorce, or if the individual is no longer considered a "child"). In such cases, USCIS will remove the individual from the pending asylum application; the individual must file his or her own asylum application as a principal applicant within a reasonable amount of time. The individual will commence to accrue unlawful presence from the time USCIS has removed the dependent from the principal's application. Individuals, who do file a bona fide application within a reasonable period of time, will be deemed to have a pending application and they do not accrue unlawful presence from the time the new bona fide application is pending.

Finally, a derivative beneficiary, who is physically present in the United States but who was not included on the asylum application, is in a period of stay authorized at the time the qualifying asylee files an Asylee/Refugee Relative Petition on behalf of the individual. DHS interprets the language of section 212(a)(9)(B)(iii)(II) of the Act to apply to all applicants for asylum, including derivative beneficiaries who obtain their status through an Asylee/Refugee Relative petition.

Adjudicators should keep in mind that if the principal asylum applicant's dependent is not yet 18 years old, then the dependent will be protected from accrual of unlawful presence under section 212(a)(9)(B)(iii)(I) of the Act.

(iii) Children Who Age Out and The Child Status Protection Act (CSPA). The CSPA amended section 208(b)(3)(B) of the Act to allow continued classification as a child for an unmarried son or daughter, who was under 21 years of age on the date the parent filed for asylum, provided that the son or daughter turned 21 years of age while the application remained pending. Therefore, if the requirements of the CSPA are met (the alien is present in the United States, named in the asylum application of his or her parent, and the application was pending on or after August 6, 2002) the individual may continue to be classified as a "child" and can be considered to have a pending application. Thus, unlawful presence does not accrue in such cases.

Example: Form I-589, Application for Asylum and for Withholding of Removal, was filed on February 7, 2000, listing a 20-year old derivative son in the United States. The son turned 21 on October 1, 2000. The application remained pending through August 6, 2002, and continues to be pending. For purposes of the asylum application, the son

continues to be a “child” because the application was filed prior to his 21st birthday. The son will not start to accrue unlawful presence until and unless the application is denied.

(C) Aliens Physically Present in the United States with pending Forms I-730

Accrual of unlawful presence stops upon the filing of a bona fide Asylee/Refugee Relative Petition (Form I-730). USCIS interprets the language of section 212(a)(9)(B)(iii)(II) of the Act to apply to refugees and asylees alike. Therefore, once the bona fide petition is properly filed on behalf of the individual, the individual will no longer accrue unlawful presence.

If the alien was already accruing unlawful presence when the Form I-730 was filed, and the Form I-730 is subsequently denied, the individual will again begin to accrue unlawful presence on the day after the denial of the petition. If, at the time of the filing of the Form I-730, the alien was protected from the accrual of unlawful presence (for example, was in lawful status or had another application pending), but the other basis for protection expired while the Form I-730 was pending, then the alien will begin to accrue unlawful presence on the day after the denial of the Form I-730.

No period during which the bona fide Form I-730 was pending will be counted in determining the accrual of unlawful presence. Since the filing of a Form I-730 does not cure any unlawful presence that has already accrued, if the individual departs during the pendency of the petition, the individual will trigger the 3-year and the 10-year bar, if, prior to the filing of the petition, the individual has already accrued sufficient unlawful presence. Because a refugee has to be admissible as an immigrant pursuant to section 207 of the Act, the individual, upon his return to the United States, will be required to file Form I-602, Application By Refugee For Waiver of Grounds of Excludability, to overcome the bars to admissibility before Form I-730 can be granted to confer derivative refugee status. If the alien departs without advance parole, the individual will have to seek the waiver through the U.S. consulate where the approved Asylee/Refugee Relative Petition will be processed.

(D) Beneficiary of Family Unity Protection (FUP) Granted pursuant to Section 301 of the Immigration Act of 1990; 8 CFR 236.15. No period of time in which an alien is a beneficiary of FUP shall be taken into account in determining the period of unlawful presence in the United States, for purposes of section 212(a)(9)(B) of the Act. If the FUP application (Form I-817) is approved, the accrual of unlawful presence will be deemed to have stopped as of the date of the filing of Form I-817, Application for Family Unity Benefits, and will continue through the period the alien retains FUP protection. The grant of FUP protection does not, however, erase prior unlawful presence.

The filing of Form I-817, by itself, does not stop the accrual of unlawful presence. If the Form I-817 is denied, the individual will continue to accrue unlawful presence as if no Form I-817 had been filed.

Section 212(a)(9)(B)(iii)(III) of the Act, by its terms, applies only to Family Unity Program benefits under section 301 of the Immigration Act of 1990. Congress provided similar benefits under section 1504 of the LIFE Act Amendments of 2000. As a matter of policy, USCIS treats section 1504 FUP cases the same as section 301 FUP cases, for purposes of the accrual of unlawful presence. See *AFM* chapter 40.9.2(b)(3)(F), below.

(E) Certain Battered Spouses, Parents, and Children. An approved VAWA self-petitioner and his or her child(ren) can claim an exception from inadmissibility under section 212(a)(9)(B)(i) of the Act, if he or she can establish a substantial connection between the abuse suffered, the unlawful presence, and his or her departure from the United States. He or she claims this exception by submitting evidence of such substantial connection with his or her adjustment application. If the exception is granted, the individual is deemed to not be inadmissible under section 212(a)(9)(B)(i) of the Act for purposes of future immigration benefits. This exception does not apply to inadmissibility under section 212(a)(9)(C)(i) of the Act, which has its own VAWA waiver in section 212(a)(9)(C)(iii) of the Act.

(F) Victims of Severe Form of Trafficking in Persons. Section 212(a)(9)(B)(i) of the Act does not apply to certain victims of severe forms of trafficking. See section 212(a)(9)(B)(iii)(V) of the Act. Similar to the battered spouses, a victim of a severe form of trafficking in persons may claim an exception to inadmissibility under section 212(a)(9)(B)(i) of the Act, if he or she can demonstrate that the severe form of trafficking (as that term is defined in section 7102 of Title 22 U.S.C.) was at least one central reason for the alien's unlawful presence in the United States. An individual can claim the exception by submitting evidence of the central reason with Form I-914, Application for T Nonimmigrant Status, or, at the time of the adjustment, when filing Form I-485, Application to Register Permanent Residence or Adjust Status. 8 CFR 214.11; 8 CFR 245.23 If the exception is granted by USCIS, the individual will be deemed to have never accrued any unlawful presence for purposes of the current nonimmigrant benefits application or any future benefits application.

If the exception is not granted, the individual may apply for a discretionary waiver of the ground of inadmissibility. If seeking T nonimmigrant status, the alien would apply under section 212(d)(3)(A) or 212(d)(13) of the Act by filing Form I-192, Advance Permission to Enter as Nonimmigrant. See 8 CFR 212.16. If the alien is already a T nonimmigrant, and is seeking adjustment of status, the alien would file Form I-601, Application for Waiver Grounds of Inadmissibility. See 8 CFR 212.18.

(G) Nonimmigrants with Pending Requests for Extension of Status (EOS) or Change of Status (COS) ("Tolling"). Pursuant to section 212(a)(9)(B)(iv) of the Act, a nonimmigrant, who has filed a timely request for extension of nonimmigrant status (EOS) or change of nonimmigrant status (COS), is protected from accruing unlawful presence during the pendency of the application for up to 120 days (the accrual of unlawful presence is "tolled"). Section 212(a)(9)(B)(iv) of the Act is only applicable to the three-year bar of section 212(a)(9)(B)(i)(I) of the Act, and is also referred to as the

"tolling-provision." However, unlawful presence for purposes of the 3-year bar will only be tolled, if

- 1) the alien has been lawfully admitted or paroled into the United States, and
- 2) the application for EOS or COS is timely filed, and not frivolous, and
- 3) the alien does not engage and/or has not been engaging in unauthorized employment. See section 212(a)(9)(B)(iv) of the Act.

By policy, USCIS has extended the 120-day statutory tolling period to cover the entire period during which an application for EOS or COS is pending; this extension is valid for the 3-year and the 10-year bars. For a more detailed description of this extension and guidance concerning whether unlawful presence accrues after the 120-day period specified by the statute, please see section 3(C) below.

(3) Aliens Present in Unlawful Status Who Do not Accrue Unlawful Presence by Virtue of USCIS Policy for Purposes of Sections 212(a)(9)(B) and (C)(i)(I) of the Act

As noted in section (a)(2) of this *AFM* chapter, there are some circumstances in which an alien whose status is actually unlawful is, nevertheless, protected from the accrual of unlawful presence. As a matter of policy, USCIS has determined that an alien whose status is actually unlawful does not accrue unlawful presence in the situations described in this subsection. These exceptions are based on policy, unlike the statutory exceptions listed in sections 212(a)(9)(B)(iii) and (iv) of the Act that were discussed in section (b)(2) of this *AFM* chapter. It is USCIS' policy that these exceptions apply to unlawful presence accrued for purposes of sections 212(a)(9)(B) and (C)(i)(I) of the Act unless otherwise noted in this section.

(A) Aliens with Properly Filed Pending Applications for Adjustment of Status or Registry (Sections 209, 245, and 245(i) of the Act, sections 202 of Public Law 99-603 (Cuban-Haitian Adjustment), section 202(b) of NACARA, section 902 of HRIFA, and aliens with properly filed, pending Registry applications under section 249 of the Act). Accrual of unlawful presence stops on the date the application is properly filed pursuant to 8 CFR 103 and the regulatory filing requirements governing the particular type of benefit sought. Note that, if the application is properly filed according to the regulatory requirements, the applicant will not accrue unlawful presence, even if it is ultimately determined that the applicant was not eligible for the benefit in the first place. The accrual of unlawful presence is tolled until the application is denied.

Example: An alien, who has been unlawfully in the United States for 90 days, and who had worked without authorization during the 90 days, applies for adjustment of status based on an approved I-130, Petition for Alien Relative. The

application for adjustment of status is properly filed, that is, the application is fully executed, signed, and the applicant pays the proper fee. See 8 CFR 103.2(a)(7). Also, with the application package, the alien provides a copy of Form I-797, Notice of Approval for the Alien Relative Petition, and a copy of the newest Visa Bulletin, demonstrating that a visa number is immediately available in his or her preference category. See 8 CFR 245.2. Therefore, USCIS accepts the application and stamps it as received and properly filed as of January 1, 2007. What is not readily apparent from the initial review of the application is that the alien had previously worked without authorization, and therefore, he or she is not eligible to apply for adjustment of status pursuant to section 245(c) of the Act. However, because the application was accepted by USCIS as (technically) properly filed, the applicant is now in authorized stay and does not accrue any unlawful presence during the pendency of the properly filed application for adjustment of status.

At the time of the interview, on April 1, 2007, the applicant's adjustment of status application is denied based on section 245(c) of the Act, for having been employed without authorization. On April 2, 2007, the alien's accrual of unlawful presence resumes because he or she no longer has a pending application for adjustment of status. The alien departs the United States on May 1, 2007, after having secured an immigrant visa interview at the US Embassy/consular section in his or her home country. In assessing the alien's inadmissibility under section 212(a)(9) of the Act, the consular officer will count the alien's 90 days of unlawful presence that accrued prior to the filing of the adjustment of status application, and the 30 days of unlawful presence that accrued after the adjustment of status application was denied. However, the consular officer will not count the time period during which the adjustment of status application was pending because the individual was in a period of stay authorized and did not accrue unlawful presence during the pendency of the adjustment application. In total, the alien had accrued 120 days of unlawful presence in the United States; the alien is not inadmissible under section 212(a)(9)(B) of the Act.

Except in the case of a NACARA or HRIFA application, the application must have been filed affirmatively (with USCIS) rather than defensively (before the immigration judge as a form of relief from removal) for it to toll the accrual of unlawful presence; that is, an alien, who files an application for adjustment of status after being served with a Notice to Appear (NTA) in removal proceedings, is not protected from the accrual of unlawful presence. Accrual of unlawful presence resumes the day after the application is denied. However, if the application that was filed with USCIS is denied, and the alien has a legal basis upon which to renew the application in proceedings before an immigration judge, the protection against the accrual of unlawful presence will continue through the administrative appeal. See for example for adjustment of status applications under section 245 of the Act: 8 CFR 245.2(a)(5)(ii) and 8 CFR 1245.2(a)(5)(ii).

(B) Nonimmigrants with Pending Requests for Extension of Status (EOS) or Change of Status (COS) ("Tolling"). As noted in 40.9.2(b)(2)(G) of this *AFM* chapter, by statute, an alien does not accrue unlawful presence for up to 120 days while a non-frivolous EOS or COS application is pending, provided that the alien does not work and/or has not worked unlawfully. This is referred to as "tolling:" while the application is pending after having been properly filed, the alien will not accrue unlawful presence. The above described statutory exception applies to section 212(a)(9)(B)(i)(I) of the Act; it does not apply to section 212(a)(9)(B)(i)(II) or (C)(i)(I) of the Act.

However, according to USCIS policy, an alien does not accrue unlawful presence (the accrual of unlawful presence is tolled), and is considered in a period of stay authorized for purposes of sections 212(a)(9)(B)(i)(I), (B)(i)(II), and (C)(i)(I) of the Act during the entire period a properly filed EOS or COS application is pending, if the EOS or COS application meets the following requirements:

- the non-frivolous request for EOS or COS was filed timely. To be considered timely, the application must have been filed with USCIS, i.e. be physically received (unless specified otherwise, such as mailing or posting date) before the previously authorized stay expired. See 8 CFR 103.2(a)(7); 8 CFR 214.1(c)(4); 8 CFR 248.1(b). An untimely request may be excused in USCIS' discretion pursuant to 8 CFR 214.1(c)(4) and 8 CFR 248.1(b); and
- the alien did not work without authorization before the application for EOS or COS was filed or while the application is pending; and
- the alien has not failed to maintain his or her status prior to the filing of the request for EOS or COS.

If these requirements are met, the period of authorized stay covers the 120-day tolling period described in section 212(a)(9)(B)(iv) of the Act and extends to the date a decision is issued on the request for EOS or COS.

A request for EOS or COS may be filed on Form I-539, Application to Extend/Change Nonimmigrant Status, or may be included in the filing of Form I-129, Petition for a Nonimmigrant Worker.

Please see Section 40.9.2(b)(2)(G) of this *AFM* chapter for a detailed description of the statutory tolling provision under section 212(a)(9)(B)(iv) of the Act, covering *only* inadmissibility under section 212(a)(9)(B)(i)(I) of the Act.

(C) Nonimmigrants with Pending Requests for Extension of Status (EOS) or Change of Status (COS) Who Depart the United States During the Pendency. Departure from the United States while a request for EOS or COS is pending, does not subject an alien to the 3-year, 10-year, or permanent bar, if he or she departs after the expiration of Form I-94, Arrival/Departure Record unless the application was frivolous,

untimely, or the individual had worked without authorization. D/S nonimmigrants, who depart the United States while an application for COS or EOS is pending, generally do not trigger the 3-year, 10-year, or permanent bar under sections 212(a)(9)(B)(i) or 212(a)(9)(C)(i)(I) of the Act.

- Evidentiary Considerations: If the applicant subsequently applies for a nonimmigrant visa abroad, the individual has to establish to the satisfaction of the consular officer that the application was timely filed and not frivolous. The requirement that the application was timely may be established through the submission of evidence of the date the previously authorized stay expired, together with a copy of a dated filing receipt, a canceled check payable to USCIS for the EOS or COS application, or other credible evidence of a timely filing.
- Determination by a Consular Officer that the Application Was Non-Frivolous: To be considered non-frivolous, the application must have an arguable basis in law and fact, and must not have been filed for an improper purpose (such as to prolong one's stay to pursue activities inconsistent with one's status). In determining whether an EOS or COS application was non-frivolous, DOS has instructed consular posts that it is not necessary to make a determination that USCIS would have ultimately ruled in favor of the alien. See 9 Foreign Affairs Manual (*FAM*) 40.92 Notes, Note 5c.

(D) **Nonimmigrants - Effect of a Decision on the Request for Extension of Status (EOS) or Change of Status (COS) on Unlawful Presence**. The following information pertains to applications requesting EOS or COS, or petitions that include requests for EOS or COS.

(i) Approved Requests. If a request for EOS or COS is approved, the alien will be granted a new period of authorized stay, retroactive to the date the previous period of authorized stay expired. This applies to aliens admitted until a specific date and aliens admitted for D/S.

(ii) Denials Based on Frivolous Filings or Unauthorized Employment. If a request for EOS or COS is denied because it was frivolous or because the alien engaged in unauthorized employment, any and all time after the expiration date marked on Form I-94, Arrival/Departure Record, will be considered unlawful presence time, if the alien was admitted until a specific date. However, if the alien was admitted for D/S, unlawful presence begins to accrue on the date the request is denied.

(iii) Denials of Untimely Applications. If a request for EOS or COS is denied because it was not timely filed, unlawful presence begins to accrue on the date Form I-94 expired. If, however, the alien was admitted for D/S, unlawful presence begins to accrue the day after the request is denied.

(iv) Denials for Cause of Timely Filed, Non-Frivolous Applications for EOS or COS. If a timely filed, non-frivolous request for EOS or COS is denied for cause, unlawful presence begins to accrue the day after the request is denied.

(v) Motion to Reopen/Reconsider. The filing of a motion to reopen or reconsider does not stop the accrual of unlawful presence. See 8 CFR 103.5(a)(iv) (Effect of motion or subsequent application or petition). However, if the motion is successful and the benefit granted, the grant is effective retroactively. The alien will be deemed to not have accrued unlawful presence. If DHS reopens proceedings, but ultimately denies the petition or application again, the petition or application will be considered to have been pending since the initial filing date. Thus, unlawful presence will accrue as specified in paragraphs (ii), (iii) or (iv). In the case of a timely, non-frivolous application, unlawful presence will accrue from the date of the last denial of the petition or application, not from the earlier, reopened decision.

(vi) Appeal to the Administrative Appeals Office (AAO) of the Underlying Petition Upon Which an EOS or COS Is Based. If an individual applies for an EOS or COS as part of an I-129, Petition for Nonimmigrant Worker, the adjudicator has to adjudicate two requests: The petition seeking a particular classification, and the request for an EOS or COS.

The denial of an EOS or COS cannot be appealed. See 8 CFR 214.1(c)(5) and 248.3(g). However, the denial of the underlying petition for the status classification can, in general, be appealed. The filing of an appeal to the AAO for the denial of the underlying petition, however, has no influence on the accrual of unlawful presence. Unlawful presence starts to accrue on the day of the denial of the request for EOS or COS regardless of whether the applicant or the petitioner appeals the denial of the petition to the AAO. However, if the denial of the underlying petition is reversed on appeal, and the EOS or COS subsequently granted, the individual is not deemed to have accrued any unlawful presence between the denial of the petition and request for EOS or COS, and the subsequent grant of the EOS or COS.

(vii) Nonimmigrants - Multiple Requests for EOS Or COS ("Bridge Filings") and Its Effect on Unlawful Presence. The terms "authorized status" (authorized period of admission or lawful status) and "period of stay authorized by the Secretary of Homeland Security" are not interchangeable. They do not carry the same legal implications. See Section (a)(2) of this *AFM* chapter. An alien may be in a period of stay authorized by the Secretary of Homeland Security but not in an authorized status.

An alien whose authorized status expires while a timely filed request for EOS or COS is pending, is in a period of stay authorized by the Secretary of Homeland Security. The alien does not accrue unlawful presence as long as the timely filed request is pending. However, the filing of a request for EOS or COS does not put an individual into valid

and authorized nonimmigrant status, i.e. he or she is not in authorized status. Therefore, if an individual has filed an initial application for EOS or COS and subsequently files additional (untimely) requests for EOS or COS, the subsequently filed request will not stop the individual from accruing unlawful presence, if the initial request is denied.

(E) Aliens with Pending Legalization Applications, Special Agricultural Worker (SAW) Applications, and LIFE Legalization Applications. An alien who properly filed an application under section 245A of the Act (including an applicant for Legalization under any Legalization-related Class Settlement Agreements), section 210 of the Act, or section 1104 of the LIFE Act, is in a period of authorized stay as long as the application remains pending. Accrual of unlawful presence stops on the date the application is filed and resumes the day after the application is denied. However, if the denial is appealed, the period of authorized stay continues through the administrative appeals process. Denied applications cannot be renewed before an immigration judge. Therefore, the period of authorized stay does not continue through removal proceedings or while a petition for review is pending in Federal court.

(F) Aliens granted Family Unity Program Benefits under section 1504 of the LIFE Act Amendments of 2000

Section 212(a)(9)(B)(III)(iii) of the Act, by its terms, applies only to Family Unity Program (FUP) benefits under section 301 of the Immigration Act of 1990. Congress provided similar benefits under section 1504 of the LIFE Act Amendments of 2000. As a matter of policy, USCIS treats section 1504 FUP cases the same as section 301 FUP cases, for purposes of the accrual of unlawful presence.

As with section 301 FUP cases, if the Form I-817 is approved, then the alien will be deemed not to accrue unlawful presence from the Form I-817 filing date throughout the period of the FUP grant.

A grant of FUP benefits under section 1504 does not, however, erase any unlawful presence accrued before the grant of FUP benefits under section 1504 of the LIFE Act Amendments of 2000.

Also, as with section 301 FUP cases, the filing of Form I-817, by itself, does not stop the accrual of unlawful presence. If the Form I-817 is denied, the individual will continue to accrue unlawful presence as if no Form I-817 had been filed.

(G) Aliens with Pending Applications for Temporary Protected Status (TPS) pursuant to Section 244 of the Act. The period of authorized stay begins on the date a prima facie application for TPS is filed, provided the application is ultimately approved. If the application is approved, the period of authorized stay continues until TPS status is terminated. If the application is denied, or if prima facie eligibility is not established, unlawful presence accrues as of the date the alien's previous period of authorized stay

expired. The application for TPS can be renewed in removal proceedings pursuant to 8 CFR 244.11 and 8 CFR 1244.11, and the period of authorized stay continues through removal proceedings.

(H) Aliens Granted Voluntary Departure pursuant to Section 240B of the Act

Voluntary departure is a discretionary relief that allows certain favored aliens to leave the country willingly. Voluntary departure can either be granted by DHS, by the immigration judge, or the Board of Immigration Appeals (BIA). The length of the voluntary departure period that can be granted depends on the stages of proceedings the alien is in. If the alien is not in removal proceedings, DHS can grant voluntary departure for up to 120 days. See section 240B(a) and 8 CFR 240.25. The denial of voluntary departure at this stage, cannot be appealed; however, the denial is without prejudice to the alien for a later application of voluntary departure in removal proceedings. See 8 CFR 240.25(e).

If the alien is in removal proceedings but these proceedings are not yet completed, or if the alien's proceedings are at the conclusion, the immigration judge or the judge at the BIA, may grant voluntary departure. See section 240B(a) or (b) of the Act; 8 CFR 1240.26. If the IJ denies voluntary departure, the denial can be appealed to the BIA. 8 CFR 1240.26(g). The time period granted can be up to 120 days if granted prior to completion, or up to 60 days if granted at the conclusion of proceedings. See 8 CFR 1240.26(e). Under certain circumstances, the voluntary departure period can be extended, or voluntary departure reinstated. Voluntary departure is always granted in lieu of removal proceedings or a final order of removal. Therefore, if an alien timely departs according to the voluntary departure period, the alien is not subject to a final order of removal. However, if the alien fails to depart, and there was an alternate order of removal, the alternate order will become effective upon the alien's failure to depart. See 8 CFR 1240.26(d).

On December 18, 2008, the Department of Justice amended the voluntary departure rule; the changes became effective on January 20, 2009 and apply prospectively only. 73 FR 76927 (December 18, 2008). The new rules clarified the relationship between voluntary departure and the filing of a motion to reopen/reconsider or petition for review. It also clarified the impact of the failure to post bond on voluntary departure and the alternate order of removal.

General Rule for the Accrual of Unlawful Presence in Connection With A Grant of Voluntary Departure: Accrual of unlawful presence stops on the date an alien is granted voluntary departure and resumes on the day after voluntary departure expires, if the alien has not departed the United States according to the terms of the grant of voluntary departure.

(i) Voluntary Departure Granted by DHS pursuant to 8 CFR 240.25 (Including Extension of Voluntary Departure). If DHS grants voluntary departure before initiation of removal

proceedings, time spent in voluntary departure does not add to an alien's unlawful presence. A grant of voluntary departure prior to the initiation of removal proceedings may not exceed 120 days. See section 240B(a)(2) of the Act. Pursuant to 8 CFR 240.25, voluntary departure may be extended at the discretion of the Field Office Director, except that the total period allowed, including any extensions, may not exceed the 120-day limit. Courts may not extend voluntary departure but they may reinstate voluntary departure.

(ii) Voluntary Departure Granted Pursuant to Section 240B of the Act after the Initiation of Removal Proceedings. If a person is granted voluntary departure after commencement of removal proceedings, unlawful presence ceases to accrue with the grant, and resumes after the expiration of the voluntary departure period. Voluntary departure after the initiation of removal proceedings is governed by section 240B(b) of the Act and 8 CFR 1240.26.

If the immigration judge grants voluntary departure, the alien is not subject to the 3-year bar because of the wording of section 212(a)(9)(B)(i)(I) of the Act. However, the fact that proceedings commenced does not stop the accrual of unlawful presence time for purposes of the 10-year and the permanent bar. See 8 CFR 239.3.

(iii) Reversal of a Denial of Voluntary Departure. If the denial of voluntary departure by the Immigration Judge is reversed on appeal by the BIA, the time from the denial to the reversal will be considered authorized stay in the United States (Remember: A denial of voluntary departure by USCIS cannot be appealed.)

(iv) Reinstatement of Voluntary Departure by the Board Of Immigration Appeals (BIA) or the Immigration Judge. An immigration judge or the BIA may reinstate voluntary departure in a removal proceeding that has been reopened for a purpose other than solely making an application for voluntary departure, and if reopening was granted prior to the expiration of the original period of voluntary departure. See 8 CFR 1240.26(h). In no event can the reinstatement of voluntary departure result in a total period of time, including any reinstatement, exceeding the 60 or the 120 days of voluntary departure stated in section 240B of the Act. If voluntary departure is reinstated by the BIA or by the immigration judge, the time from the expiration of the grant of voluntary departure to the grant of reinstatement is not considered authorized stay. However, the time of the reinstated voluntary departure to the ending period of this voluntary departure, is considered authorized stay. Reinstatement of voluntary departure is regulated at 8 CFR 1240.26(h).

(v) Effect of a Petition for Review. In a case involving a grant of voluntary departure before January 20, 2009, if a Federal court with jurisdiction to review the removal order stays the running of the voluntary departure period while the case is pending, the alien will continue to be considered to be under a grant of voluntary departure and will not accrue unlawful presence.

For any EOIR grant of voluntary departure on or after January 20, 2009, however, the filing of a petition for review terminates a grant of voluntary departure and makes the alternate removal order immediately effective. 8 CFR 1240.26(i). If the alien files a petition for review, therefore, the alien will no longer be protected from the accrual of unlawful presence based on the voluntary departure grant. If the alien remains in the United States while the petition is pending, the accrual of unlawful presence will begin the day after the petition for review is filed. This regulation, however, gives the alien 30 days after filing the petition for review in order to leave the United States voluntarily. If the alien leaves within this 30-day period, the alien will continue to be protected from the accrual of unlawful presence up to the date of the alien's actual departure.

(vi) Voluntary Departure and the Filing of A Motion to Reopen To the Board of Immigration Appeals (BIA)

A motion to reopen is a form of procedural relief that asks the BIA to change its decision in light of newly discovered evidence or a change in circumstances since the hearing. See *Dada v. Mukasey*, 128 S.Ct. 2307, 2315 (2008). In general, a motion to reopen has to be filed within 90 days. See 240(c)(7) of the Act. Therefore, an alien granted voluntary departure for a period of up to 60 days is either faced with the choice of departing according to the voluntary departure order, or to make use of his or her statutory right to file the motion to reopen and to await the result of the adjudication of the motion.

In 2008, the Supreme Court addressed the issue and held that to safeguard the right to pursue a motion to reopen for voluntary departure recipients, the alien must be permitted to withdraw, unilaterally and without regards to the underlying merits of the motion to reopen, a voluntary departure request before expiration of the departure period. See *Dada v. Mukasey*, 128 S.Ct. 2307, 2320 (2008). As a result, the alien has the option either to abide by the terms and receive the agreed upon benefits of voluntary departure; or, alternatively, to forego those benefits and remain in the United States to pursue an administrative motion.

Therefore, if an alien was initially granted voluntary departure by the immigration judge or the Board of Immigration Appeals before January 20, 2009, but the alien later requests withdrawal of the voluntary departure order, the alien will commence to accrue unlawful presence at the time of the administratively final order of removal unless the alien is otherwise protected from the accrual of unlawful presence (such as the grant of a stay of removal by the BIA). The motion to reopen does not toll voluntary departure. If the alien requests a withdrawal of the voluntary departure order, the alien will accrue unlawful presence as if voluntary departure had never been granted even if the request for withdrawal is made, for example, on the last day of the voluntary departure period.

The *Dada* decision does not apply, however, to any EOIR grant of voluntary departure that is made on or after January 20, 2009. Under 8 CFR 1240.26(b)(3)(iii), filing a

motion to reopen or reconsider during the voluntary departure period automatically terminates the grant of voluntary departure, and makes the alternative removal order effective immediately. Thus, for a grant of voluntary departure on or after January 20, 2009, the alien will no longer be protected from the accrual of unlawful presence beginning the day after the date the alien files a motion to reopen or to reconsider.

(I) **Aliens Granted Stay of Removal.** A stay of removal is an administrative or judicial remedy of temporary relief from removal. The grant of a stay of removal can be automatic or discretionary. See sections 240(b)(5) and 241(c)(2) of the Act; 8 CFR 241.6, 8 CFR 1241.6, 8 CFR 1003.6, and 8 CFR 1003.23(b)(1)(v). During a grant of stay of removal, DHS is prevented from executing any outstanding order of removal, deportation, or exclusion. Therefore, an alien granted stay of removal does not accrue unlawful presence during the period of the grant of stay of removal. A stay of removal does not erase any previously accrued unlawful presence.

If an individual is ordered removed in absentia pursuant to section 240(b)(5)(A) of the Act, and he or she challenges the order in a motion to rescind the in absentia order pursuant to section 240(b)(5)(C) of the Act, the alien's removal order will be stayed automatically until the motion is decided. See section 240(b)(5)(C) of the Act. The order will be stayed through a possible appeal to the Board of Immigration Appeals (BIA) or Federal court. See *Matter of Rivera-Claros*, 21 I&N Dec. 232 (BIA 1996). For purposes of section 212(a)(9)(B) and (C)(i)(I) of the Act, an individual, who filed a motion to rescind an in absentia order of removal pursuant to section 240(b)(5)(C) of the Act, will not accrue unlawful presence during the pendency of the motion, including any stages of appeal before the BIA or Federal court.

(J) **Aliens Granted Deferred Action.** A DHS field office director may, in his or her discretion, recommend deferral of (removal) action, an act of administrative choice in determining, as a matter of prosecutorial discretion, to give some cases lower enforcement priority. Deferred action is, in no way, an entitlement, and does not make the alien's status lawful. Deferred action simply recognizes that DHS has limited enforcement resources and that every attempt should be made administratively to utilize these resources in a manner which will achieve the greatest impact under the immigration laws. There is no specific authority for deferred action codified in law or regulation although certain types of benefits refer to a grant of deferred action. For more information on Deferred Action, please see Detention and Removal Operations Policy and Procedure Manual (DROPPM), Chapter 20.8.

Accrual of unlawful presence stops on the date an alien is granted deferred action and resumes the day after deferred action is terminated. The granting of deferred action does not eliminate any prior periods of unlawful presence.

(K) **Aliens Granted Withholding of Removal under Section 241(b)(3) of the Act or Deportation under Former Section 243 of the Act.** Accrual of unlawful presence

stops on the date that withholding is granted and continuous through the period of the grant.

(L) **Aliens Granted Withholding of Removal or Deferral of Removal under the United Nations Convention Against Torture Pursuant to 8 CFR 208.16 and 8 CFR 208.17.** Accrual of unlawful presence stops on the date that withholding or deferral is granted and continuous through the period of the grant.

(M) **Aliens Granted Deferred Enforced Departure (DED).** The period of authorized stay begins on the date specified in the Executive Order or other Presidential directive and ends when DED is no longer in effect.

(N) **Aliens Granted Satisfactory Departure under 8 CFR 217.3.** Under 8 CFR 217.3(a), a Visa Waiver Program (VWP) alien, who obtains a grant of satisfactory departure from U.S. Immigration and Customs Enforcement, and who leaves during the satisfactory departure period, is deemed to not have violated his or her VWP admission. Thus, unlawful presence will not accrue during the satisfactory departure period, if the alien departs as required. If the alien remains in the United States after the expiration of the grant of satisfactory departure, unlawful presence will begin to accrue the day after the satisfactory departure period expires unless some other provision or policy determination protects the person from accrual of unlawful presence. See section (b) of this *AFM* chapter.

(4) Effect of the Protection from the Accrual of Unlawful Presence on Previously Accrued Unlawful Presence: Protection from the Accrual of Unlawful Presence Does Not Cure Previously Accrued Unlawful Presence

Unless stated otherwise, protection from the accrual of unlawful presence under any section of this *AFM* chapter does *not* cure any unlawful presence that the alien may have already accrued before the alien came to be protected.

Example: An alien accrues 181 days of unlawful presence. He or she then applies for adjustment of status. Although the alien had accrued 181 days of unlawful presence before he or she applied for adjustment of status, the alien stops to accrue unlawful presence once the adjustment of status application is properly filed. However, the already accrued unlawful presence of 181 days continues to apply to the alien. If the alien departs after having obtained a grant of advance parole, the individual will be subject to the 3-year bar under section 212(a)(9)(B)(i)(I) of the Act.

(5) Effect of Removal Proceedings on Unlawful Presence

(A) **Initiation of Removal Proceedings.** The initiation of removal proceeding has no effect, neither to the alien's benefit nor to the alien's detriment, on the accrual of unlawful presence. See 8 CFR 239.3. If the alien is already accruing unlawful presence

when removal proceedings are initiated, the alien will continue to accrue unlawful presence unless the alien is protected from the accrual of unlawful presence (as described in these *AFM* chapters). If the alien is not accruing unlawful presence when removal proceedings begin, the alien will continue to be protected from the accrual of unlawful presence until the immigration judge determines that the individual has violated his or her status, or until Form I-94, Arrival/Departure Record expires, whichever is earlier (and regardless of whether the decision is subsequently appealed).

Example 1: An alien, who is present without inspection, is placed in proceedings. The alien was already accruing unlawful presence when placed in proceedings, and will continue to do so while in proceedings unless a provision described in this *AFM* chapter stops the accrual of unlawful presence.

Example 2: An alien, admitted as an LPR, is placed in removal proceedings because of a criminal conviction. As an LPR, the alien does not accrue unlawful presence. The alien will not begin to do so unless the alien becomes subject to a final order of removal, that is, when LPR status is terminated.

Example 3: An alien, admitted as a nonimmigrant for duration of status, is placed in removal proceedings. The alien does not accrue unlawful presence while the proceedings are pending. If the immigration judge rules in the alien's favor on the removal charge, no unlawful presence applies to the alien. If the immigration judge sustains the removal charge, unlawful presence begins to accrue the day after the immigration judge's decision becomes administratively final.

Example 4: An alien is admitted as a nonimmigrant until January 10, 2011. On March 15, 2009, DHS places the alien in removal proceedings, claiming that the alien had violated a condition of admission. On May 1, 2010, the immigration judge sustains the removal charge, and the alien appeals. The Board of Immigration Appeals affirms the decision. Once the removal order becomes administratively final, the alien will accrue unlawful presence from May 2, 2010, the day after the immigration judge's order.

Example 5: An alien is admitted as a nonimmigrant until January 10, 2011. On March 15, 2009, DHS places the alien in removal proceedings, claiming that the alien had violated a condition of admission. On May 1, 2010, the immigration judge rules in the alien's favor and dismisses the removal charge. The alien will not be deemed to have accrued any unlawful presence.

Example 6: An alien in unlawful status properly files with USCIS an adjustment of status application. USCIS denies the application and places the alien in proceedings. The alien renews the application before the Immigration Judge. Because the alien is renewing an affirmative application that had stopped the

accrual of unlawful presence, the alien does not accrue unlawful presence while the adjustment application is pending before the IJ.

Example 7: An alien whose nonimmigrant admission ended on November 6, 2008, is placed in removal proceedings. On February 6, 2009, the alien files an adjustment application with the immigration judge. The alien had never filed with USCIS. Because the application is not the “renewal” of an affirmative application, filing the application with the immigration judge does not stop the accrual of unlawful presence.

Example 8: Same facts as in Example 7, except that the alien’s application is under NACARA or HRIFA. In this situation, filing the application *does* stop the accrual of unlawful presence.

Example 9: An alien is admitted as a nonimmigrant until January 10, 2011. On March 15, 2009, DHS places the alien in removal proceedings, claiming that the alien had violated a condition of admission. Removal proceedings are still pending on January 11, 2011. Regardless of the outcome of the proceedings, the alien will accrue unlawful presence the day after the I-94 expires, that is, on January 11, 2011.

The result in Example 9 is consistent with *Matter of Halabi*, 15 I&N Dec.105 (BIA 1974), where the Board of Immigration Appeals (BIA) held that the expiration of the alien’s authorized period of stay rendered the alien subject to removal without the need to resolve the original charge listed in the Notice to Appear (in *Halabi*, the individual was originally charged with having violated his status). The BIA indicated that being able to charge the alien as a visa overstay from the date the alien’s period of authorized stay expired, although while in removal proceedings, did not “punish” the alien for contesting the original removal charge. See *Halabi*, at 106; see also *Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471, 491 (1999) (Removal of an alien, who has remained longer than authorized, is not punishment but simply a matter of the alien’s “being held to the terms under which he was admitted.”); cf. *Westover v. Reno*, 202 F.3d 475 (1st Cir. 2000) (dicta), and *Halabi* at 107-08 (Roberts, Board Chair, dissenting). The alien may avoid any accrual of unlawful presence, for example, by offering to settle the removal proceeding by agreeing to leave the United States no later than the date his or her status expires in return for dismissal of the charge of having violated his or her status before that date. See 8 CFR 239.2(a)(4) (notice to appear may be cancelled, if alien has left the United States). Leaving at the expiration of the period of authorized stay and the resulting dismissal of removal proceedings would also avoid the risk of a ruling against the alien on the original charge of having violated his or her status before it expired.

(B) Effect of Filing an Appeal or Petition for Review on Unlawful Presence. As noted, the initiation of removal proceedings does not affect the accrual of unlawful presence. See 8 CFR 239.3. Thus, the fact that an alien or DHS files an appeal to the Board of Immigration Appeals (BIA) or seeks judicial review of a removal order or the relief granted, does *not* affect the alien's position in relation to the accrual of unlawful presence. If the Board or a Federal court vacates the removal order, however, the alien will not be deemed to have accrued unlawful presence solely on the basis of the vacated removal order. If the Board or the Federal court affirms the removal order, the alien will be deemed to have accrued unlawful presence from the date of the immigration judge's order, unless the alien was already accruing unlawful presence on that date.

(6) Effect of an Order of Supervision pursuant to 8 CFR 241.5 on Unlawful Presence

Unless protected by some other provision included in this *AFM* chapter, an alien present in an unlawful status continues to accrue unlawful presence despite the fact that the alien is subject to an order of supervision under 8 CFR 241.5.

(c) Relief from Inadmissibility under Section 212(a)(9)(B)(i)(I) and (II), and Section 212(a)(9)(C)(i)(I) of the Act

(1) Waiver of the 3-Year Bar or the 10-Year Bar under Section 212(a)(9)(B)(i) of the Act

(A) **Nonimmigrants.** If a nonimmigrant is inadmissible, the nonimmigrant may apply for advance permission to enter as a nonimmigrant despite his or her inadmissibility pursuant to section 212(d)(3) of the Act, which is granted in the discretion of the Secretary of Homeland Security. If the alien is an applicant for a nonimmigrant visa at the American consulate, the alien will have to apply for this type of temporary permission through the consulate. The application is adjudicated by the United States Customs and Border Protection (CBP), Admissibility Review Office (ARO) pursuant to section 212(d)(3)(A)(i) of the Act. If the alien is an applicant at the U.S. border for admission because he or she is not required to apply for a visa (other than visa waiver applicants), the application is filed with a CBP designated port of entry or designated Preclearance office. See section 212(d)(3)(A)(ii) and 8 CFR 212.4.

If the nonimmigrant status applicant is an applicant for T or U visa status, the applicant has to file Form I-192 with USCIS at the Vermont Service Center (VSC).

(B) Immigrants and Adjustment of Status Applicants Who Are the Spouses, Sons, or Daughters of U.S. Citizens or LPRs, and Fiancé(e)s of U.S. Citizens. DHS has discretion to waive an alien's inadmissibility under section 212(a)(9)(B) of the Act if the alien is applying for an immigrant visa or adjustment of status and the alien is the spouse, son, or daughter of a U.S. citizen or LPR, or the fiancé(e) of a U.S. citizen (in

relation to a K-1/K-2 visa). The alien must establish that denying the alien's admission to the United States, or removing the alien from the United States would result in extreme hardship to the alien's U.S. citizen or LPR spouse, parent, or the K visa petitioner. See section 212(a)(9)(B)(v) of the Act; see 8 CFR 212.7(a). The application is filed on Form I-601, Application for Waiver of Grounds of Inadmissibility, with the respective fee as stated in 8 CFR 103.7(b). There is no judicial review available, if the waiver is denied but the denial can be appealed to the Administrative Appeals Office of USCIS pursuant to 8 CFR 103.

If the alien seeks a waiver in relation to an application for a K-1 or K-2 visa, approval of the waiver is conditioned on the K-1's marrying the citizen who filed the K nonimmigrant visa petition within the statutory time of three (3) months from the day of the K-1 nonimmigrant's admission. The reason for this condition is that, at the time of the issuance of the K-1 or K-2 nonimmigrant visa, the K-1 and K-2 nonimmigrants are not yet legally related to the petitioner in the manner required by section 212(a)(9)(B)(v) of the Act. If the K-1 nonimmigrant does not marry the petitioner, and the K-1 and K-2 nonimmigrants do not acquire LPR status on that basis, USCIS may ultimately deny the Form I-601.

There is no waiver available to an alien parent if only his or her U.S. citizen or LPR child experiences extreme hardship on account of the mother's or father's removal.

(C) **Asylees and Refugees Seeking Adjustment of Status**. Section 212(a)(9)(B) grounds of inadmissibility can be waived for Asylees and Refugees seeking adjustment of status pursuant to section 209(c) of the Act. Such aliens must file Form I-602, Application by Refugee For Waiver of Grounds of Excludability. Under current USCIS policy, it is within the adjudicator's discretion to determine whether the waiver can be granted without requiring the filing of Form I-602. See *AFM* chapter 41.6; October 31, 2005, Domestic Operations memorandum – *Re: Waiver under Section 209(c) of the Immigration and Nationality Act* (*AFM* Update 05-33).

Normally, waiver applications for refugees are handled overseas before a person is approved for refugee classification. See 8 CFR 207.3(b). However, if a ground of inadmissibility arose after the alien's approval for refugee classification, or if the ground was not known to the officer who made such approval, the waiver may be sought and adjudicated as part of the refugee adjustment process. See *AFM* Chapter 23.6 (Asylee and Refugee Adjustment).

(D) **TPS Applicants**. Section 212(a)(9)(B) of the Act may be waived for humanitarian purposes, to assure family unity, or when it would be in the public interest to grant the waiver. The waiver is filed on Form I-601, Application for Waiver of Grounds of Inadmissibility. See section 244 of the Act; 8 CFR 244.3.

Granting a waiver to a TPS applicant for purposes of the TPS application does not waive any grounds of inadmissibility in connection with a subsequent application for adjustment of status, although both are filed on Form I-601. This is because the standard for adjustment of status applicants to have a ground of inadmissibility waived is generally an "extreme hardship"- standard for section 212(a)(9)(B) of the Act (3-year and 10-year bars), and not the lesser standard for TPS, i.e. the standard that the waiver may be granted for "humanitarian purposes, to assure family unity, or public interest."

Therefore, if an adjustment of status applicant, who was previously granted TPS status, presents an approved Form I-601 to the adjudicator, the adjudicator should not accept this approved Form I-601 as evidence that the alien is not inadmissible under section 212(a)(9)(B) of the Act for purposes of the adjustment of status application. Rather, the adjudicator should direct the applicant to file a new Form I-601 to overcome the specific grounds of inadmissibility for adjustment of status purposes.

(E) Legalization under Section 245A of the Act and Any Legalization-related Class Settlement Agreements, and Legalization Applicants pursuant to 8 CFR 245a.2(k) and 8 CFR 245a.18. The waiver can be granted for humanitarian purposes, to ensure family unity, or when the granting of such a waiver is otherwise in the public interest. The waiver is filed on Form I-690, Application for Waiver of Grounds of Inadmissibility pursuant to Section 245A or 210 of the Immigration and Naturalization Act.

(2) Waiver of the Permanent Bar under Section 212(a)(9)(C)(i)(I) of the Act

Generally, there is no "waiver" of inadmissibility under section 212(a)(9)(C)(i)(I) of the Act. Rather, an alien who is inadmissible under section 212(a)(9)(C)(i) of the Act must, generally, obtain consent to reapply for admission under section 212(a)(9)(C)(ii) of the Act. See *AFM* chapter 43 concerning Consent to Reapply, which is sought by filing Form I-212, Application for Permission to Reapply for Admission into the United States after Deportation or Removal.

As stated by the Board of Immigration Appeals (BIA) in *Matter of Torres-Garcia*, 23 I&N Dec. 866 (BIA 2006), the consent to reapply regulation at 8 CFR 212.2 predates the enactment of section 212(a)(9)(C) of the Act and the related consent to reapply provision in section 212(a)(9)(A)(iii) of the Act. Thus, although the *filing procedures* in 8 CFR 212.2 are still in effect, the substantive requirements of the provisions in section 212(a)(9) of the Act govern during the adjudication of Form I-212, Application for Permission to Reapply for Admission into the United States After Deportation and Removal; a USCIS adjudicator must consider the specific requirements of section 212(a)(9)(C)(ii) of the Act when adjudicating Form I-212. A Form I-212 cannot be approved for an alien who is inadmissible under section 212(a)(9)(C)(i) of the Act unless the alien has been abroad for at least 10 years. *Matter of Torres-Garcia, supra*. This rule applies in the 9th Circuit as well as in other circuits. *Gonzales v. Department of Homeland Security*, 508 F.3d 1227 (9th Cir. 2007).

There are, however, some waivers that are also available to certain categories of aliens, who are inadmissible under section 212(a)(9)(C)(i)(I) of the Act. If an alien is eligible for one of these waivers, and the waiver is granted, it is not necessary for the alien to obtain approval of a Form I-212.

(A) **HRIFA and NACARA Applicants.** A waiver can be granted at the discretion of USCIS. The waiver is sought by filing Form I-601, Application for Waiver of Grounds of Inadmissibility. See 8 CFR 245.13(c)(2) and 8 CFR 245.15(e)(3). However, the standard that applies to the adjudication is the same standard as if the alien had filed Form I-212, Application for Permission to Reapply for Admission into the United States after Deportation or Removal. See February 14, 2001 Office of Field Operations Memorandum, *Changes to Section 202 of the Nicaraguan Adjustment and Central American Relief Act (NACARA), and the Haitian Refugee Immigration Fairness Act of 1998 (HRIFA), based Upon the Provisions of and Amendments to the Legal Immigration Family Equity Act (LIFE)*.

(B) **Legalization, SAW, LIFE Act Legalization, and Legalization Class Settlement Agreement Applicants.** A waiver can be granted to such an applicant, if the applicant establishes that a waiver should be granted based on humanitarian reasons, to ensure family unity, or because granting the waiver would be in the public interest. The waiver is filed on Form I-690, Application for Waiver of Grounds of Excludability under Section 245A or 210 of the Act. See 8 CFR 210.3(e), 8 CFR 245a.2(k), and 8 CFR 245a.18(c).

(C) **TPS Applicants.** TPS applicants may obtain waivers for certain grounds of inadmissibility, including inadmissibility under section 212(a)(9)(C) of the Act. See section 244(c)(2) of the Act. The permanent bar may be waived for humanitarian purposes, to assure family unity, or when the granting of the waiver is in the public interest. See 8 CFR 244.3. The waiver is filed on Form I-601, Application for Waiver of Grounds of Inadmissibility. See *id.*

Granting a waiver to an applicant for purposes of the TPS application does not waive any grounds of inadmissibility in connection with a subsequent application for adjustment of status, although both are filed on Form I-601. This is because the standard for adjustment of status applicants to have waived inadmissibility is different from the one used for TPS applicants. In order to overcome the permanent bar to admissibility under section 212(a)(9)(C)(i)(I) of the Act, an applicant for an immigrant visa has to file Form I-212, Application for Permission to Reapply for Admission into the United States after Deportation or Removal, rather than Form I-601, and no earlier than ten (10) years after the alien's last departure. See section 212(a)(9)(C)(ii) of the Act.

Therefore, if an adjustment of status applicant, who was previously granted TPS status, presents an approved Form I-601 to the adjudicator, the adjudicator should not accept this approved Form I-601 as evidence that the person is not inadmissible under section 212(a)(9)(C)(i)(I) of the Act for purposes of the adjustment of status application. Any

Form I-212 that is filed by a TPS applicant would be adjudicated according to same principles that apply generally to aliens who are inadmissible under section 212(a)(9)(C)(i)(I) of the Act, including the requirement that the alien may not obtain consent to reapply under section 212(a)(9)(C)(ii) unless the alien satisfies the 10-year absence requirement in the statute.

(D) **Certain Battered Spouses, Parents, and Children**. An approved VAWA self-petitioner and his or her child(ren) can apply for a waiver from inadmissibility under section 212(a)(9)(C)(i) of the Act, if he or she can establish a "connection" between the abuse suffered, the unlawful presence and departure, or his or her removal, and the alien's subsequent unlawful entry/entries or attempted reentry/reentries. See section 212(a)(9)(C)(iii) of the Act. The waiver is filed on Form I-601, Application for Waiver of Grounds of Inadmissibility, with fee. If the waiver is granted, the ground of inadmissibility and any relating unlawful presence is deemed to be erased for purposes of any future immigration benefits applications.

(E) **Asylee and Refugee Adjustment Applicants under Section 209(c) of the Act**. Asylee and Refugee applicants for adjustment of status may obtain a waiver of inadmissibility in lieu of consent to reapply. The waiver is filed on Form I-602, Application by Refugee for Waiver of Grounds of Excludability. See 8 CFR 209.1 and 8 CFR 209.2(b); see also AFM chapter 41.6. Under current USCIS policy, it is within the adjudicator's discretion to determine whether the waiver can be granted without requiring the filing of Form I-602. See AFM chapter 41.6; October 31, 2005, Domestic Operations memorandum – *Re: Waiver under Section 209(c) of the Immigration and Nationality Act* (AFM Update 05-33).

Normally, waiver applications for refugees are handled overseas before a person is approved for refugee classification. See 8 CFR 207.3. However, if a ground of inadmissibility arose after the alien's approval for refugee classification, or if the ground was not known to the officer who made such approval, the waiver may be sought and adjudicated as part of the refugee adjustment process. See AFM chapter 23.6 (Asylee and Refugee Adjustment).

Note that the 10-year waiting period normally imposed on applicants for consent to reapply under this ground of inadmissibility (see section 212(a)(9)(C)(ii) of the Act) does not apply to refugee and asylee adjustment applicants.

(F) **Nonimmigrants**. An alien who is inadmissible under section 212(a)(9)(C)(i)(I) may, as a matter of discretion, be admitted as a nonimmigrant under section 212(d)(3) of the Act. The alien may make the application when applying for the nonimmigrant visa with the Department of State or, if eligible, file Form I-192 to seek this benefit. Obtaining relief under section 212(d)(3) does not relieve the alien of the need to obtain consent to reapply under section 212(a)(9)(C)(ii) of the Act if the alien seeks to acquire permanent residence.

AD 08-03 [Date signed]	Chapter 40.9.2	This memorandum eliminates chapter 30.1(d) of the <i>Adjudicator's Field Manual (AFM)</i> , and redesignates the section as chapter 40.9.2
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4. Use

This memorandum is intended solely for the training and guidance of USCIS personnel in performing their duties relative to the adjudication of applications. It is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law or by any individual or other party in removal proceedings, in litigation with the United States, or in any other form or manner.

5. Contact Information

Operational questions regarding this memorandum may be directed to Roselyn Brown-Frei, Office of Policy and Strategy. Inquiries should be vetted through appropriate supervisory channels.

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Certiorari Granted by Rehaif v. U.S., U.S., January 11, 2019

888 F.3d 1138

United States Court of Appeals, Eleventh Circuit.

UNITED STATES of America, Plaintiff–Appellee,

v.

Hamid Mohamed Ahmed Ali

REHAIF, Defendant–Appellant.

No. 16-15860

|

(March 26, 2018)

Synopsis

Background: In prosecution for possessing a firearm and ammunition while being illegally or unlawfully in United States, the United States District Court for the Middle District of Florida, No. 6:16-cr-00003-JA-DAB-1, John Antoon II, J., 2016 WL 2770878, granted government's motions in limine, and granted in part and denied in part defendant's motion in limine, and thereafter, defendant was convicted of the charged offenses. Defendant appealed.

Holdings: The Court of Appeals, Dubina, Circuit Judge, held that:

[1] government was not required to prove that defendant knew he was in United States illegally or unlawfully when he possessed a firearm and ammunition;

[2] illegal or unlawful presence does not require adjudication by an officer of U.S. Citizenship and Immigration Services (USCIS) or an Immigration Judge (IJ); and

[3] defendant's presence became illegal or unlawful when his nonimmigrant student visa was out of status.

Affirmed.

Opinion, 868 F.3d 907, vacated and superseded.

West Headnotes (8)

[1] Commerce

🔑 Weapons and explosives

Weapons

🔑 Violation of other rights or provisions

Statute prohibiting possession of firearm or ammunition while being illegally or unlawfully in United States was not unconstitutional under Commerce Clause, facially or as applied to defendant, whose nonimmigrant student visa was out of status when he possessed a firearm and ammunition, by allegedly having too attenuated a connection to interstate commerce. U.S. Const. art. 1, § 8, cl. 3; 18 U.S.C.A. § 922(g) (5)(A).

Cases that cite this headnote

[2] Criminal Law

🔑 Instructions

Criminal Law

🔑 Review De Novo

The Court of Appeals reviews the District Court's jury instructions de novo to determine whether they misstated the law or misled the jury to the prejudice of the defendant.

Cases that cite this headnote

[3] Weapons

🔑 Other individuals prohibited from possession

Statutory offense of possession of firearm or ammunition while being illegally or unlawfully in United States, for which offense the punishment statute requires a knowing violation, did not require government to prove that defendant knew he was in United States illegally or unlawfully when he possessed a firearm and ammunition; while defendant's status might be inextricably tied to statutory violation, actual violation occurred when defendant, whose nonimmigrant student visa was out of status, knowingly possessed a

firearm or ammunition. 18 U.S.C.A. §§ 922(g)(5)(A), 924(a)(2).

3 Cases that cite this headnote

[4] Weapons

Other individuals prohibited from possession

Mens rea requirement of statute prohibiting possession of firearm or ammunition while being illegally or unlawfully in United States applies to the possession element, and does not apply to the status element of the offense; it is not required that defendant know he is an alien unlawfully in the United States. 18 U.S.C.A. §§ 922(g)(5)(A), 924(a)(2).

2 Cases that cite this headnote

[5] Statutes

Legislative silence, inaction, or acquiescence

Statutes

Legislative Construction

The long-time failure of Congress to alter the law after it has been judicially construed, and the enactment by Congress of legislation which implicitly recognizes the judicial construction as effective, is persuasive of legislative recognition that the judicial construction is the correct one.

Cases that cite this headnote

[6] Weapons

Other individuals prohibited from possession

An alien is illegally or unlawfully in United States, as element of possessing a firearm or ammunition while being illegally or unlawfully in United States, if alien's presence within United States is forbidden or not authorized by law, even though alien's illegal or unlawful presence has not been adjudicated by an officer of U.S. Citizenship and Immigration Services (USCIS) or an Immigration Judge (IJ). 18 U.S.C.A. § 922(g)(5)(A); 27 C.F.R. § 478.11.

1 Cases that cite this headnote

[7] Weapons

Other individuals prohibited from possession

Defendant was illegally or unlawfully in United States, as element of possessing a firearm or ammunition while being illegally or unlawfully in United States, where defendant's nonimmigrant student visa was out of status when he possessed a firearm and ammunition. 18 U.S.C.A. § 922(g)(5)(A).

2 Cases that cite this headnote

[8] Criminal Law

Liberal or strict construction; rule of lenity

The rule of lenity, for an ambiguous criminal statute, is not applicable where a longstanding, unambiguous regulation gives potential offenders fair notice of what is proscribed.

Cases that cite this headnote

***1140** Appeal from the United States District Court for the Middle District of Florida, D. C. Docket No. 6:16-cr-00003-JA-DAB-1

Attorneys and Law Firms

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Robert Godfrey, Federal Public Defender's Office, Orlando, FL, Warren W. Lindsey, Law Office of Warren W. Lindsey, PA, Winter Park, FL, for Defendant–Appellant.

Before ED CARNES, Chief Judge, WILLIAM PRYOR, and DUBINA, Circuit Judges.

Opinion

DUBINA, Circuit Judge:

We *sua sponte* vacate our prior published opinion, *United States v. Rehaif*, 868 F.3d 907 (11th Cir. 2017), and substitute this revised opinion in lieu thereof.

Hamid Mohamed Ahmed Ali Rehaif (“Rehaif”), a citizen of the United Arab Emirates, appeals his convictions for possessing a firearm and ammunition while being illegally or unlawfully in the United States, in violation of 18 U.S.C. §§ 922(g)(5)(A) and 924(a)(2). Rehaif argues that the district court erred by instructing the jury that the government did not have to prove that he knew he was in the United States unlawfully. Rehaif further argues that the district court abused its discretion by failing to instruct the jury that an alien is not unlawfully in the United States until the U.S. Citizenship and Immigration Services (“USCIS”) or an immigration judge has declared him unlawfully present. After reviewing the record, reading the parties’ briefs, and having the benefit of oral argument, we affirm the convictions.

I. BACKGROUND

The United States issued Rehaif an F-1 nonimmigrant student visa to study mechanical engineering at the Florida Institute of Technology (“FIT”) on the condition that he pursue a full course of study—except as otherwise authorized by a “Designated School Official”—or engage in training following graduation. When applying for his F-1 student visa, Rehaif signed a Certificate of Eligibility for Nonimmigrant Student Status, certifying that he agreed to comply with the terms and conditions of his admission and that he sought “to enter or remain in the United States temporarily, and solely for the purpose of pursuing a full course of study.”

After three semesters at FIT, Rehaif was academically dismissed on December 17, 2014. One month later, on January 21, 2015, FIT sent Rehaif an email stating that he had been academically dismissed *1141 and that his “immigration status will be terminated on February 5, 2015, unless you transfer out before that date, or you notify our office that you have already left the United States.” Rehaif did not take any action. As such, according to the Department of Homeland Security’s

foreign student database, Rehaif’s status was officially terminated on February 23, 2015.

On December 2, 2015, Rehaif went to a shooting range. He purchased a box of ammunition and rented a firearm for one hour. Videos from the shooting range show Rehaif firing two different firearms. The firearms were manufactured in Austria and then imported into the United States through Georgia. The ammunition was manufactured in Idaho.

Six days later, an employee at the Hilton Rialto Hotel in Melbourne, Florida, called the police to report that a guest at the hotel—Rehaif—had been acting suspiciously. Special Agent Tom Slone with the Federal Bureau of Investigation went to the hotel to speak with Rehaif. Rehaif admitted, in an unrecorded interview, that he had fired two firearms at the shooting range and that he was aware that his student visa was out of status because he was no longer enrolled in school. Rehaif consented to a search of his hotel room, where the agents found the remaining ammunition that he had purchased at the shooting range.

A federal grand jury charged Rehaif with two counts of violating § 922(g)(5)(A). That statute provides that:

(g) It shall be unlawful for any person—

...

(5) who, being an alien—

(A) is illegally or unlawfully in the United States ... to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition. ...

18 U.S.C. § 922(g)(5)(A). Section 922(g) does not itself provide for any punishment. That gap is filled by § 18 U.S.C. § 924(a)(2), which states that:

Whoever knowingly violates subsection ... (g) ... of section 922 shall be fined as provided in this title, imprisoned not more than 10 years, or both.

18 U.S.C. § 924(a)(2).

Before trial, both parties submitted proposed jury instructions to the district court. During the charge conference, the government requested an instruction stating that “[t]he United States is not required to prove that the defendant knew that he was illegally or unlawfully in the United States.” Rehaif disagreed, arguing that the United States had to prove both that he had knowingly possessed a firearm and that he had known of his prohibited status—that he was illegally or unlawfully in the United States when he had possessed the firearm. The district court overruled Rehaif’s objection.

[1] The government also requested an instruction stating that “[t]he alien’s presence becomes unlawful upon the date of the status violation.” Rehaif, on the other hand, proposed an instruction stating that “[a] person admitted to the United States on a student visa does not become unlawfully present until an Immigration Officer or an Immigration Judge determines that [he] ha[s] violated [his] student status.” The district court gave an instruction closer to the government’s request, telling the jury that “[a]n alien illegally or unlawfully in the United States is an alien whose presence within the United States is forbidden or not authorized by law.” Rehaif then perfected this appeal, challenging the district court’s jury instructions with respect to the “knowingly” requirement and *1142 the “illegal or unlawful” requirement, as well as the constitutionality of § 922.¹

II. STANDARD OF REVIEW

[2] This court will review the district court’s jury instructions “*de novo* to determine whether they misstate the law or mislead the jury to the prejudice of the objecting party.” *United States v. James*, 642 F.3d 1333, 1337 (11th Cir. 2011) (quotation omitted).

III. ANALYSIS

On appeal, Rehaif challenges the district court’s jury instructions regarding the “knowingly” requirement and the “illegal or unlawful” requirement.

With respect to the “knowingly” requirement, Rehaif argues that the district court erred by instructing the jury that the government need not prove that he knew he was in the United States illegally or unlawfully, because the phrase “knowingly violates,” in 18 U.S.C. § 924(a)(2), modifies § 922(g) to require proof that the defendant knew at the time that he possessed the firearm that he was in the United States illegally or unlawfully. Rehaif further argues that, although several courts have ruled that knowledge of one’s status as a convicted felon is not necessary for a conviction under § 922(g)(1), the question of whether knowledge is necessary for a conviction under § 922(g)(5)(A) is not settled. As such, Rehaif argues, the district court’s jury instruction misstated the law and eviscerated his planned defense that he did not know he was in the United States illegally or unlawfully.

The government argues that a violation of § 922(g) only requires that the defendant knowingly possessed a firearm, not that the defendant had knowledge of his status, and that nothing in the statute indicates that § 922(g)(5)(A) has a different mens rea requirement. For support, the government points to the fact that no circuit has required proof of the defendant’s knowledge of his prohibited status under any subsection of § 922(g). The government also argues that § 922(g) consolidates previously separate sections that did not contain mens rea provisions but that had been interpreted to require knowledge of the firearm possession, and that Congress did not intend to expand the mens rea requirement when it consolidated the statutes.

With respect to the “illegal or unlawful” requirement, Rehaif argues that federal immigration law defines “unlawful presence” as presence in the United States after the expiration of the period of stay authorized by the Attorney General. This definition, he argues, supports his position that a person is not unlawfully in the United States until a USCIS official or an immigration judge declares him to be so. Additionally, Rehaif argues that both his position and the government’s position have a basis in case law or statute and that the ambiguity in the statute requires the application of the rule of lenity.

The government responds that, although this court has not addressed this issue, five other circuits have held that an alien who is permitted to remain in the United States only for the duration of his status becomes illegally or unlawfully in the United States under § 922(g)(5)(A)

upon the violation of his status. Therefore, Rehaif became unlawfully in the United States the moment he failed to comply with the conditions *1143 of his F-1 visa. The government also argues that the case Rehaif cites to support his position does not state that an alien only becomes illegally or unlawfully present when a USCIS officer or immigration judge determines that he has violated his status. Moreover, the government argues that because the statute is not grievously ambiguous, the rule of lenity does not apply.

In short, we are left with two questions: (1) what does “knowingly” modify; and (2) what does “illegally or unlawfully” mean? Each argument will be addressed in turn.

A. “Knowingly”

[3] [4] Under 18 U.S.C. § 922(g), persons falling within particular categories are prohibited from possessing any firearm or ammunition that has been transported in interstate commerce. To successfully prosecute a defendant under § 922(g), the government must prove three elements: (1) the defendant falls within one of the categories listed in the § 922(g) subdivisions (“the status element”); (2) the defendant possessed a firearm or ammunition (“the possession element”); and (3) the possession was “in or affecting [interstate or foreign] commerce.” See 18 U.S.C. § 922(g). By its own terms, § 922(g) does not have a mens rea requirement; instead, the applicable mens rea is set out by § 924(a)(2), which provides that “[w]hoever knowingly violates subsection ... (g) ... of section 922 shall be fined as provided in this title, imprisoned not more than 10 years, or both.” 18 U.S.C. § 924(a)(2). It is undisputed that the mens rea requirement applies to the possession element—that Rehaif “knowingly possessed” the firearm. See *United States v. Winchester*, 916 F.2d 601, 604 (11th Cir. 1990). At issue is whether the “knowingly” requirement also applies to the status element—that Rehaif knows he is an alien “illegally or unlawfully in the United States.” 18 U.S.C. § 922(g)(5)(A).

As Rehaif points out, the strongest argument in favor of requiring proof of mens rea with respect to the status element is laid out in then-Judge, now Justice Gorsuch's concurrence in *United States v. Games-Perez*, 667 F.3d 1136, 1142 (10th Cir. 2012) (Gorsuch, J., concurring in judgment). Acknowledging that prior precedent dictated that the mens rea requirement does not apply to the status

element, then-Judge Gorsuch concluded that the plain language of the statute compelled the opposite conclusion. *Id.* (“[Prior precedent] reads the word “knowingly” as leapfrogging over the very first § 922(g) element and touching down only at the second. This interpretation defies linguistic sense—and not a little grammatical gravity.”). In drawing such a conclusion, then-Judge Gorsuch noted that, “Congress gave us three elements in a particular order. And it makes no sense to read the word ‘knowingly’ as so modest that it might blush in the face of the very first element only to regain its composure and reappear at the second.” *Id.* at 1144. He also pointed out that “[t]he Supreme Court has long held that courts should presum[e] a mens rea requirement attaches to each of the statutory elements that criminalize otherwise innocent conduct.” *Id.* at 1145 (quotations omitted) (alteration in original).

While then-Judge Gorsuch opined that § 922(g) “is a perfectly clear law as it is written, plain in its terms, straightforward in its application,” *id.*, there is evidence to suggest otherwise. The fact that § 924(a)(2) only punishes defendants who “knowingly violate” § 922(g) begs the question “what does it mean to knowingly violate the statute?” Does the statute proscribe merely conduct, or both conduct and the surrounding circumstances that make the conduct a federal crime? See *1144 *United States v. Langley*, 62 F.3d 602, 613 (4th Cir. 1995) (en banc) (Phillips, J., concurring in part and dissenting in part) *cert. denied*, 516 U.S. 1083, 116 S.Ct. 797, 133 L.Ed.2d 745 (1996). Indeed, then-Judge Gorsuch acknowledged that the term “knowingly” in § 924(a)(2) does not apply to every provision of § 922(g), *Games-Perez*, 667 F.3d at 1144, for § 922(g) requires the “firearm or ammunition [to have] been shipped or transported in interstate or foreign commerce,” and the Supreme Court has repeatedly explained that “the existence of [a] fact that confers federal jurisdiction need not be one in the mind of the actor at the time he perpetrates the act.” *Torres v. Lynch*, — U.S. —, 136 S.Ct. 1619, 1631, 194 L.Ed.2d 737 (2016) (quoting *United States v. Feola*, 420 U.S. 671, 676 n.9, 95 S.Ct. 1255, 1260 n. 9, 43 L.Ed.2d 541 (1975)). The plain text of the statutes does not require that the defendant “know” every detail outlined in § 922(g). At most, then-Judge Gorsuch's concurrence serves to illustrate that the language of § 922 and § 924(a)(2) is not “perfectly clear,” and that other tools of interpretation must be employed to ascertain whether a mens rea requirement attaches to the status element.

In *United States v. Jackson*, we resolved the issue of whether “knowingly” applies to the status element of § 922(g).² 120 F.3d 1226 (11th Cir. 1997). *Jackson* involved § 922(g)(1), which is identical to § 922(g)(5)(A), except that it proscribes gun possession by felons, as opposed to possession by those illegally or unlawfully in this country. Compare 18 U.S.C. § 922(g)(1), with § 922(g)(5)(A). Much like Rehaif, the defendant in *Jackson* argued that “the district court erroneously instructed the jury that it was not necessary for [him] to know that he had been convicted of a felony” to find him guilty of violating § 922(g)(1). *Jackson*, 120 F.3d at 1229. Relying on cases from the Fourth and Fifth Circuits, this court held that the government need not prove that the defendant knew of his prohibited status. See *id.* (citing *Langley*, 62 F.3d at 604–06 (majority opinion); *United States v. Dancy*, 861 F.2d 77, 81 (5th Cir.1988)). We are bound by this decision “[u]nder our prior precedent rule, [which requires us] to follow a binding precedent in this Circuit unless and until it is overruled by this court en banc or by the Supreme Court.” *Evans v. Ga. Reg'l Hosp.*, 850 F.3d 1248, 1255 (11th Cir. 2017) (internal quotation and citation omitted).

[5] Additionally, there is a longstanding uniform body of precedent holding that the government does not have to satisfy a mens rea requirement with respect to the status element of § 922. “The predecessor statutes to § 922(g)[]” that forbade felons to transport, receive, or possess firearms “contained no mens rea requirement,” leading courts “interpreting these predecessor statutes [to] require[] ... proof that the defendant knowingly received, transported, or possessed a firearm.” *Langley*, 62 F.3d at 604 (internal quotation and citation omitted). “[B]ut, at the same time, [these decisions] recognized that the defendant's knowledge of the weapon's interstate nexus or of his felon status was irrelevant.” *Id.* (internal quotation and citation omitted). True, in 1986, Congress amended § 924(a) to require “knowing” *1145 violations of § 922(g). *Id.*; see also Pub. L. No. 99–308, § 104(a), 100 Stat. 449, 456 (1986). But this codification did not compel a new interpretation. Although “a significant change in [statutory] language” ordinarily “is presumed to entail a change in meaning,” ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 256 (2012) (emphasis added), the addition of a mens rea identical to that already imposed by courts does not suggest a change in meaning. Although defendants pointed to this change

as evidence that the government must prove “that the defendant knew not only that he possessed a firearm but that it had an interstate nexus and that he was a felon,” *Dancy*, 861 F.2d at 81, courts routinely rejected these arguments. See, e.g., *id.* at 81–82; *Langley*, 62 F.3d at 604–06; *Jackson*, 120 F.3d 1226. And no court of appeals has required proof of the defendant's knowledge of his prohibited status under any subsection of § 922(g).³

Moreover, despite ample opportunity to do so, Congress has never revisited the issue.⁴ “The long time failure of Congress to alter [the law] after it had been judicially construed, and the enactment by Congress of legislation which implicitly recognizes the judicial construction as effective, is persuasive of legislative recognition that the judicial construction is the correct one.” *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 488, 60 S.Ct. 982, 989, 84 L.Ed. 1311 (1940); see also *Kimble v. Marvel Entm't, LLC*, — U.S. —, 135 S.Ct. 2401, 2409–10, 192 L.Ed.2d 463 (2015) (“All our interpretive decisions, in whatever way reasoned, effectively become part of the statutory scheme, subject (just like the rest) to congressional change. Absent special justification, they are balls tossed into Congress's court, for acceptance or not as that branch elects. ... Congress's continual reworking of the patent laws ... further supports leaving the decision in place.”). Indeed, after appellate courts confirmed that the mens rea requirement of § 924 applied only to the possession element of offenses under § 922, Congress expanded the scope of § 922(g) without revisiting § 924(a)(2). In 1996—after the decisions in *Dancy* and *Langley*—Congress extended the prohibition on firearm possession to individuals “who ha[ve] been convicted in *1146 any court of a misdemeanor crime of domestic violence.” Pub. L. No. 104–208, § 658, 110 Stat. 3009, 372 (1996) (codified at § 922(g)(9)).

Although it may seem that failing to require proof that the defendant had the requisite knowledge with respect to the status element is at odds with the traditional rule that the government must prove mens rea for each substantive element of the crime, upon closer inspection, even at common law and early American law, the government did not have the burden of proving that the defendant knew a specific fact or detail about himself. Two examples illustrate this point: statutory rape and bigamy. In the instance of statutory rape, while there may be issues of proof with respect to the victim's age, the government does not have to prove that the defendant knew he was the age

of majority. *See, e.g., State v. Running*, 53 N.D. 896, 208 N.W. 231, 233–34 (1926) (requiring that the government prove the defendant's age—but not that he knew his age—to establish the degree of statutory rape); *Hall v. State*, 40 Neb. 320, 58 N.W. 929, 930 (1894) (requiring that an information charging statutory rape charge that the defendant was over 18, but not that he knew he was over 18). Similarly, with respect to bigamy, the government does not have to prove that the defendant knew he was married. *See* G.A. Endlich, *The Doctrine of Mens Rea*, 13 CRIM. L. MAG. 831, 841–42 (1891). In short, even traditional crimes have never required the defendant's knowledge of the status element.⁵

That the Supreme Court has repeatedly underscored a “presumption in favor of a scienter requirement [for] ... each of the statutory elements that criminalize otherwise innocent conduct,” *United States v. X–Citement Video, Inc.*, 513 U.S. 64, 72, 115 S.Ct. 464, 469, 130 L.Ed.2d 372 (1994); *see also Torres*, 136 S.Ct. at 1630 (“In general, courts interpret criminal statutes to require that a defendant possess a mens rea, or guilty mind, as to every element of an offense.”), does not change the conclusion that the government need not prove that the defendant knew *his own status*, even when this status is what brings the defendant within the ambit of a criminal law. Instead, precedents on this point require only that the government prove mens rea for elements of an offense that concern the characteristics of *other people and things*. For example, in *Staples v. United States*, the Supreme Court explained that the government could secure a conviction under a statute that forbade the possession of automatic firearms only if it could prove that the defendant “knew” that the gun he possessed was capable of automatic fire in addition to proving that the defendant knowingly possessed the gun. 511 U.S. 600, 602–03, 619, 114 S.Ct. 1793, 1795–96, 128 L.Ed.2d 608 (1994). In *X–Citement Video*, the Supreme Court interpreted a statute that forbade the “knowing” transportation, receipt, or distribution of “visual depiction[s] involv[ing] the use of a minor engaging in sexually explicit conduct” to require the government to prove that the defendant knew that the depiction in question featured a minor, and not just that the defendant knowingly possessed the depiction. 513 U.S. at 68, 78, 115 S.Ct. at 467, 472 (internal quotation and citation omitted). In *Flores–Figueroa v. United States*, the Supreme Court explained that a statute that forbade a person from “knowingly transfer[ing], possess[ing], or us[ing] ... a means of identification of

another person” required the government to prove that the defendant knew that the identification belonged to another person, and not just that the defendant knowingly used the identification. *1147 556 U.S. 646, 647, 129 S.Ct. 1886, 1888, 173 L.Ed.2d 853 (2009) (internal citation and quotation omitted). And in *Posters ‘N’ Things, Ltd. v. United States*, the Supreme Court interpreted a statute that forbade the sale of drug paraphernalia to require the government to prove that the defendant “knew that the items at issue [were] likely to be used with illegal drugs.” 511 U.S. 513, 524, 114 S.Ct. 1747, 1753, 128 L.Ed.2d 539 (1994). But we are aware of no precedent that requires the government to prove that the defendant knew of his own status. To the contrary, the Supreme Court has suggested that the “presumption of mens rea” for an element of an offense carries far less force when there is little “opportunity for reasonable mistake” about that element. *X–Citement Video*, 513 U.S. at 72 n. 2, 115 S.Ct. at 469 n. 2. A defendant's knowledge of his own status offers little room for “reasonable mistake.” *Id.*

Finally, as the Fourth Circuit held in *Langley*,

Our conclusion that Congress did not intend, through [Firearms Owners' Protection Act of 1986] to place the additional evidentiary burdens on the government suggested by Langley is supported by several other considerations. First, it is highly unlikely that Congress intended to make it easier for felons to avoid prosecution by permitting them to claim that they were unaware of their felony status and/or the firearm's interstate nexus. Second, in light of Congress' repeated efforts to fight violent crime and the commission of drug offenses, it is unlikely that Congress intended to make the application of the enhancement provision contained in § 924(e)(1) more difficult to apply.

Id. at 606 (footnote omitted).

Textual support, prior precedent, congressional acquiescence, and analogous common law all support the conclusion that there is no mens rea requirement with respect to the status element of § 922(g). Therefore, we conclude that the district court did not err when it gave the jury instruction stating that “[t]he government is not required to prove that the defendant knew that he was illegally or unlawfully in the United States.”

B. “Illegally or unlawfully”

[6] [7] While this court has never addressed at what point an alien becomes illegally or unlawfully in the United States for purposes of § 922(g)(5)(A), Rehaif’s argument that an alien does not become illegal until he has been adjudicated as such by an USCIS official or an immigration judge fails for four reasons.

First, the district court’s instruction—that “[a]n alien illegally or unlawfully in the United States is an alien whose presence within the United States is forbidden or not authorized by law”—is more consistent with the plain text of § 922(g)(5)(A). *See* Unlawful, Black’s Law Dictionary (10th ed. 2014) (defining “unlawful” as “[n]ot authorized by law”).

Second, as the Tenth Circuit explained in *United States v. Atandi*, “Congress has proven quite capable of demonstrating the circumstances in which it intended federal firearms disabilities to hinge upon the result of an adjudication.” 376 F.3d 1186 (10th Cir. 2004). Other § 922(g) subdivisions refer to, for example, a person “who is subject to a court order[ed]” restraining order, or to a person “who has been convicted in any court of a misdemeanor crime of domestic violence.” 18 U.S.C. § 922(g)(8)–(9); *Atandi*, 376 F.3d at 1188. If Congress had intended for § 922(g)(5)(A) to depend on a decisionmaker’s adjudication, it would have so stated. *1148 *Atandi*, 376 F.3d at 1188 (citing *Russello v. United States*, 464 U.S. 16, 23, 104 S.Ct. 296, 300, 78 L.Ed.2d 17 (1983)).

Third, the Immigration and Nationality Act’s (“INA”) definition of “unlawful” is consistent with the district court’s instruction. The INA prohibits the admission of aliens who have been unlawfully present in the United States for certain periods of time. INA § 212(a)(9)(B)(i) (I), 8 U.S.C. § 1182(a)(9)(B)(i)(I). The INA states that “[f]or purposes of this paragraph, an alien is deemed to be unlawfully present in the United States if the alien is

present in the United States *after the expiration of the period of stay authorized by the Attorney General. ...*” INA § 212(a)(9)(B)(ii), 8 U.S.C. § 1182(a)(9)(B)(ii) (emphasis added). As such, a student admitted under an F-1 visa is unlawfully present if he remains in the United States after he is no longer enrolled as a full-time student. *See* 8 C.F.R. § 214.2(f)(5)(i) (defining duration of status as “the time during which an F-1 student is pursuing a full course of study at an educational institution approved by the [USCIS] for attendance by foreign students, or engaging in authorized practical training following completion of studies.”); *see also* 27 C.F.R. § 478.11 (defining unlawful as “any alien ... [w]ho is a nonimmigrant and whose authorized period of stay has expired or who has violated the terms of the nonimmigrant category in which he or she was admitted.”).

[8] Finally, the rule of lenity does not apply because § 922(g)(5)(A)’s plain text is not ambiguous. *See Johnson v. U.S.*, 529 U.S. 694, 713 n.13, 120 S.Ct. 1795, 1807 n.13, 146 L.Ed.2d 727 (2000) (“Lenity applies only when the equipoise of competing reasons cannot otherwise be resolved”). Furthermore, even if we found § 922(g)(5)(A) ambiguous, the ambiguity is resolved by the definition provided by 27 C.F.R. § 478.11, which was promulgated in 1997. *See* 62 Fed. Reg. 34,634, 34,639 (June 27, 1997). The rule of lenity is not applicable where a longstanding, unambiguous regulation gives potential offenders fair notice of what is proscribed. *See Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 704 n.18, 115 S.Ct. 2407, 2416 n.18, 132 L.Ed.2d 597 (1995).

Therefore, we conclude the district court did not err when it instructed the jury that “[a]n alien illegally or unlawfully in the United States is an alien whose presence within the United States is forbidden or not authorized by law.”

IV. CONCLUSION

For the aforementioned reasons, we affirm Rehaif’s convictions.

AFFIRMED.

All Citations

888 F.3d 1138, 27 Fla. L. Weekly Fed. C 721

Footnotes

- 1 Rehaif argues that 18 U.S.C. § 922(g) is unconstitutional, both facially and as applied, because it has too attenuated a connection to interstate commerce. This argument is foreclosed by circuit precedent. *See United States v. Wright*, 607 F.3d 708, 715–16 (11th Cir. 2010); *United States v. Scott*, 263 F.3d 1270, 1271–74 (11th Cir. 2001).
- 2 This court has not specifically addressed the illegal-alien prohibited status of § 922(g)(5)(A), but we have recognized that “each subdivision of subsection (g) differs only in its requirement that the offender have a certain status under the law.” *Winchester*, 916 F.2d at 605 (quotations omitted). Not only would it be bizarre for two § 922(g) subdivisions to have different mens rea requirements, but also, there is nothing in the text or history of § 922 to support such deviation.
- 3 *See United States v. Smith*, 940 F.2d 710, 713–14 (1st Cir. 1991) (felony conviction, § 922(g)(1)); *United States v. Huet*, 665 F.3d 588, 596 (3d Cir. 2012) (same); *Langley*, 62 F.3d at 606 (same); *United States v. Butler*, 637 F.3d 519, 524–25 (5th Cir. 2011) (dishonorable discharge, § 922(g)(6)); *United States v. Olender*, 338 F.3d 629, 637 (6th Cir. 2003) (felony conviction, § 922(g)(1)); *United States v. Stein*, 712 F.3d 1038, 1041 (7th Cir. 2013) (misdemeanor domestic violence conviction, § 922(g)(9)); *United States v. Kind*, 194 F.3d 900, 907 (8th Cir. 1999) (felony conviction, § 922(g)(1)); *United States v. Kafka*, 222 F.3d 1129, 1131 (9th Cir. 2000) (domestic violence restraining order, § 922(g)(8)); *United States v. Games–Perez*, 667 F.3d 1136, 1140 (10th Cir. 2012) (majority opinion) (felony conviction, § 922(g)(1)); *United States v. Bryant*, 523 F.3d 349, 354 (D.C. Cir. 2008) (same).
- 4 As the Fourth Circuit explained in *Langley*, “[t]he predecessor statutes to § 922(g)(1) contained no mens rea requirement. However, cases interpreting these predecessor statutes made clear that these statutes required proof of a mens rea element and were not strict liability offenses; that is, courts required proof that ‘the defendant knowingly received, transported, or possessed a firearm,’ but, at the same time, recognized that ‘the defendant’s knowledge of the weapon’s interstate nexus or of his felon status was irrelevant.’ ” 62 F.3d at 604 (citing *Dancy*, 861 F.2d at 81). We presume that when Congress enacted the Firearms Owners’ Protection Act of 1986, establishing § 922(g), and its subsequent amendments, it was aware of this history. *See White v. Mercury Marine, Div. of Brunswick, Inc.*, 129 F.3d 1428, 1434 (11th Cir. 1997) (“Congress is assumed to act with the knowledge of existing law and interpretations when it passes new legislation.”).
- 5 Of course, there could be a mistake of fact defense—but such defense is not alleged here.



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Abrogation Recognized by United States v. Garcia, 5th Cir.(Tex.),
September 8, 2017

376 F.3d 1186

United States Court of Appeals,
Tenth Circuit.

UNITED STATES of America, Plaintiff–Appellant,

v.

Denis Gisemba ATANDI, Defendant–Appellee.

No. 03–4014.

|

July 23, 2004.

Synopsis

Background: Defendant, a citizen of Kenya, was charged as an alien illegally or unlawfully in the United States in possession of firearms. The United States District Court for the District of Utah, Dale A. Kimball, J., 228 F.Supp.2d 1285, dismissed the indictment, and United States appealed.

Holdings: The Court of Appeals, Ebel, Circuit Judge, held that:

[1] alien was illegally or unlawfully in the United States, regardless of whether alien had been ordered removed, and

[2] approval of visa petition filed on alien's behalf by wife, a lawful permanent resident, did not authorize the alien to remain in the United States.

Reversed and remanded.

West Headnotes (3)

[1] Criminal Law

🔑 Review De Novo

An appellate court reviews de novo a district court's dismissal of an indictment based on its interpretation of the underlying criminal statute.

7 Cases that cite this headnote

[2] Weapons

🔑 Other individuals prohibited from possession

Alien, who committed a status violation by failing to satisfy the conditions of his student status, was illegally or unlawfully in the United States for purposes of statute prohibiting aliens illegally or unlawfully in the United States from possessing firearms, regardless of whether alien had been ordered removed at the time of the alleged firearms offense. 18 U.S.C.A. § 922(g)(5)(A).

16 Cases that cite this headnote

[3] Weapons

🔑 Other individuals prohibited from possession

Approval of visa petition filed on alien's behalf by wife, a lawful permanent resident, did not authorize the alien to remain in the United States, and therefore alien was subject to firearm restriction for aliens illegally or unlawfully present in the United States, where, at the time of the of alleged firearms offense, alien had not sought permanent resident status by filing an application to register permanent residence or adjust status. 18 U.S.C.A. § 922(g)(5)(A); Immigration and Nationality Act, § 204(a)(1)(B)(i), 8 U.S.C.A. § 1154(a)(1)(B)(i); 8 C.F.R. § 245.1(g)(1).

22 Cases that cite this headnote

Attorneys and Law Firms

***1186** Michael S. Lee, Assistant United States Attorney, Salt Lake City, UT, (Paul M. Warner, United States Attorney, with him on the briefs), for Plaintiff–Appellant.

S. Austin Johnson, Johnson Law Firm, PC, Orem, UT, for Defendant–Appellee.

Before EBEL, ANDERSON, and HARTZ, Circuit Judges.

Opinion

EBEL, Circuit Judge.

Defendant Denis Gisemba Atandi, a citizen of Kenya, was charged under 18 U.S.C. § 922(g)(5)(A) as an alien illegally or unlawfully in the United States in possession of firearms. This case requires us to decide whether § 922(g)(5)(A)'s firearm disability applies to aliens who (1) have violated the conditions of their visa status but who have not yet been ordered removed from the country, and (2) have had a Form I-130 Petition for Alien Relative filed on their behalf but who have not yet applied for permanent residence or adjustment of status. We hold that such individuals, unless otherwise authorized to be in this country, are illegally or unlawfully in the United States for purposes of ***1187** § 922(g)(5)(A), and that they are prohibited from possessing firearms and subject to prosecution under § 922(g)(5)(A) if they do so.

BACKGROUND

Atandi originally entered the United States as a tourist in 1996. In October 1999, he received F-1 student visa status and was given permission to remain in the country for the duration of his status. According to the government, Atandi stopped attending classes about two months after receiving his student visa, and Atandi admits that he failed to maintain student status.¹ Consequently, in December 2000, the Immigration and Naturalization Service (INS) initiated removal proceedings.

About a month earlier, in November 2000, Atandi had married a lawful permanent resident, Teodora Stancheva.² In February 2001, as Atandi faced the prospect of removal hearings, she filed a Form I-130 Petition for Alien Relative on his behalf. The INS approved Teodora Atandi's I-130 petition in January 2002. That approval officially established the Atandis' marital relationship for immigration purposes, and it was one prerequisite that had to be satisfied before Denis Atandi could apply for permanent residence or adjustment of status. Yet the record indicates that Atandi did not file a Form I-485 Application to Register

Permanent Residence or Adjust Status at any time relevant to this case.

On March 7, 2002, an Immigration Judge found Atandi deportable. However, Atandi was not ordered deported at that time, and the Immigration Judge scheduled later hearings on the issue of relief from removal.

In May 2002, Atandi was arrested for possessing various firearms and ammunition while illegally or unlawfully in the United States, and he was later charged in a single-count indictment under 18 U.S.C. § 922(g)(5)(A) for that offense. According to the government, Atandi had nine firearms, including an AK-47 and a Brushmaster AR-15 assault rifle. Atandi admits that he possessed ammunition and at least one firearm, but contends that he was then lawfully present in the United States. As of that time, his removal proceedings were still pending before the Immigration Judge.

The district court dismissed the indictment on the ground that Atandi's presence in this country was not illegal or unlawful at the time of the alleged violation. The government now appeals that decision.

ANALYSIS

The government can establish that a defendant was "illegally or unlawfully in the United States" under § 922(g)(5)(A) if it proves that the defendant was in this country "without authorization" at the time he or she possessed firearms or ammunition. *See United States v. Hernandez*, 913 F.2d 1506, 1513 (10th Cir.1990). Although Atandi had violated the conditions of his student visa, the district court reasoned that he was nevertheless authorized to remain in the United States (1) because no final removal order had been issued, and (2) because his wife had filed and the ***1188** government had approved a Form I-130 Petition for Alien Relative on his behalf.

[1] We take jurisdiction under 18 U.S.C. § 3731 and 28 U.S.C. § 1291, and we review de novo the district court's dismissal of the indictment based on its interpretation of the underlying criminal statute. *See United States v. Thompson*, 287 F.3d 1244, 1248-49 (10th Cir.2002). We reject both of the district court's rationales, and hold that dismissal of the indictment was improper. Accordingly, we REVERSE and REMAND for further proceedings.

A. Section 922(g)(5)(A) is not Limited to Aliens who are Subject to a Removal Order.

As noted above, Atandi was charged under 18 U.S.C. § 922(g)(5)(A), which prohibits aliens “illegally or unlawfully in the United States” from possessing firearms.³ Atandi first asserts that his presence in the United States was not illegal or unlawful because he had not formally been ordered removed. We do not agree. Atandi’s argument finds no support in the language of § 922(g), contradicts a regulation interpreting that statute, and asks us to part company with each of the other Courts of Appeals that have addressed this issue.

[2] Rather, we hold that an alien who is only permitted to remain in the United States for the duration of his or her status (as a student, for example) becomes “illegally or unlawfully in the United States” for purposes of § 922(g)(5)(A) upon commission of a status violation.⁴ We look to the date of the status violation to determine when the alien’s presence became unauthorized, not to when that violation is recognized by official decree.

To begin, Congress has proven quite capable of demonstrating the circumstances in which it intended federal firearms disabilities to hinge upon the result of an adjudication. For example, it is unlawful to possess a firearm if one “has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year,” 18 U.S.C. § 922(g)(1); “has been adjudicated as a mental defective,” *id.* at § 922(g)(4); “is subject to a court [restraining] order” under certain circumstances, *id.* at § 922(g)(8); or “has been convicted in any court of a misdemeanor crime of domestic violence,” *id.* at § 922(g)(9). In contrast, the firearm restriction that applies to aliens “illegally or unlawfully in the United States” makes no reference to an order of removal or other adjudication. *See id.* at § 922(g)(5)(A). If Congress had intended this prohibition to apply only to aliens subject to a removal order, we are satisfied that it would have said so. *Cf. Russello v. United States*, 464 U.S. 16, 23, 104 S.Ct. 296, 78 L.Ed.2d 17 (1983) (when Congress uses particular language in one section of a statute but not another, it is presumed that such language does not govern those sections in which it was omitted).

Further, an administrative regulation interpreting § 922(g)(5)(A) makes clear that an alien who violates

the conditions of his *1189 or her status is illegally or unlawfully in the United States under that statute regardless of whether he or she has actually been ordered removed. Under 27 C.F.R. § 478.11, an alien “illegally or unlawfully in the United States” is defined as an alien “not in valid immigrant, nonimmigrant or parole status.” More specifically, the regulation lists as an example of an alien illegally or unlawfully in the United States a nonimmigrant “whose authorized period of stay has expired or who has violated the terms of the nonimmigrant category in which he or she was admitted.” *Id.* Atandi, who concedes that he violated the terms of his student status, was no doubt illegally or unlawfully in the United States as that term is defined by regulation.⁵

This regulation was enacted by the Bureau of Alcohol, Tobacco and Firearms (ATF), which had been delegated authority to implement § 922(g). *See* 18 U.S.C. § 926(a) (authorizing “such rules and regulations as are necessary to carry out the provisions of this chapter”);⁶ *see also United States v. Mead Corp.*, 533 U.S. 218, 226–27, 121 S.Ct. 2164, 150 L.Ed.2d 292 (2001) (an agency’s interpretation of a statutory provision qualifies for *Chevron* deference when made in the exercise of delegated authority to make rules carrying the force of law). Without determining whether full *Chevron* deference is owed to this ATF interpretation of § 922(g)(5)(A) in light of the criminal nature of that statute, we unquestionably owe “some deference” to the ATF’s regulation. *National Labor Relations Bd. v. Okla. Fixture Co.*, 332 F.3d 1284, 1286–87 (10th Cir.2003) (en banc); *see also Babbitt v. Sweet Home Chapter of Cmty. for a Greater Ore.*, 515 U.S. 687, 703, 115 S.Ct. 2407, 132 L.Ed.2d 597 (1995) (applying *Chevron* deference to regulations interpreting parts of the Endangered Species Act that provide for criminal penalties). Here, the ATF regulation is both reasonable and consistent with our interpretive norms for criminal statutes. *See Okla. Fixture Co.*, 332 F.3d at 1287.

Finally, the Fifth and Eighth Circuits have addressed the same question presented in our case, both holding that an alien who commits a status violation is illegally or unlawfully in the United States, regardless of whether a removal order has been issued. *United States v. Igbatayo*, 764 F.2d 1039, 1040 (5th Cir.1985) (applying § 922(a)(6) and ruling that the alien was illegally in the United States because “[a]fter failing to maintain the student status required by his visa, Igbatayo was without authorization to remain in this country.”); *United States v. Bazargan*,

992 F.2d 844, 847 (8th Cir.1993) (upholding a conviction under § 922(g)(5) and stating that a “nonimmigrant alien F–1 student becomes an illegal alien subject to deportation by failing to comply with the transfer procedures set forth in the INS regulations,” notwithstanding a pending application for asylum and employment authorization).

***1190** Faced with this authority, Atandi relies upon an internal INS memorandum from September 1997 stating that for purposes of 8 U.S.C. § 1182(a)(9)(B)—Section 212(a)(9)(B) of the Immigration and Nationality Act—an alien’s “unlawful presence” begins to run as of the immigration judge’s status violation determination, not from the date of the status violation.⁷ Yet the INS memo limited its discussion to § 1182(a)(9)(B), stating that “[i]t must be emphasized that an alien may still be considered unlawfully present or in violation under other provisions of the Act (e.g., for purposes of initiating a removal proceeding) even though he or she is not deemed unlawfully present under the technical requirement of § [1182] (a)(9)(B)(ii).” We need not express any opinion as to the merits of the INS memo’s legal conclusions.⁸ For our purposes, it suffices to note that, in light of this express disclaimer, the memo’s interpretation of 8 U.S.C. § 1182(a)(9)(B) does not help guide our interpretation of the criminal statute at issue in the instant case, 18 U.S.C. § 922(g)(5)(A).

In short, based on the record before us on appeal, we hold that the government can show that Atandi was illegally or unlawfully present in this country as of May 2002 because he had been authorized to be here as a student but failed to satisfy the conditions of his student status. The fact that he had not yet been ordered removed is not relevant to the question of whether or not his presence in the United States was then authorized. Removal proceedings were the process by which the government sought to expel Atandi from the country based on his illegal presence. Those proceedings did not play the substantive role of making Atandi’s presence illegal or unauthorized in the first place.⁹

B. Approval of a Form I–130 Petition for Alien Relative does not Authorize an Alien to Remain in the United States

[3] Atandi next contends that he was authorized to remain in this country because the government had approved a Form I–130 Petition for Alien Relative ***1191**

that his wife, a lawful permanent resident, had filed on his behalf. Again, we disagree. We hold that an approved I–130 petition does not authorize an alien to stay in the United States, and therefore does not lift 18 U.S.C. § 922(g)(5)(A)’s firearm restriction for aliens illegally or unlawfully present in this country.

This question requires us briefly to outline the procedures an alien must follow when seeking to immigrate to the United States as the spouse of a lawful permanent resident. For such aliens, immigrant visas are available subject to a numerical cap based largely on worldwide immigration levels. *See* 8 U.S.C. §§ 1151(a)(1); 1153(a)(2)(A).¹⁰ To procure an immigrant visa, the lawful permanent resident spouse first must file a Form I–130 Petition for Alien Relative to establish his or her relationship with the spouse who seeks to immigrate to the United States. *See* 8 U.S.C. § 1154(a)(1)(B)(i); *Drax v. Reno*, 338 F.3d 98, 114 (2d Cir.2003). The government will approve the I–130 visa petition so long as it determines that the familial relationship asserted is bona fide. *Drax*, 338 F.3d at 114. Approval of the I–130 petition essentially places the nonresident alien on a waiting list according to his or her “priority date” (based on when the petition was filed) and “preference category” (based on the familial relationship between the alien seeking permanent residence and the person who filed the I–130 visa petition). *Id.*; 8 C.F.R. § 245.1(g)(1).

The nonresident alien will eventually become eligible to file a Form I–485 Application to Register Permanent Residence or Adjust Status when his or her priority date is current—i.e., at the time an immigrant visa is immediately available. *Drax*, 338 F.3d at 115; 8 C.F.R. § 245.1(g)(1).¹¹ “Once an alien’s I–130 petition has been approved by the INS, an alien must still wait until a visa is ‘immediately available’ in order to file his I–485 application.” *Drax*, 338 F.3d at 114. After the alien files an I–485 application, he or she may accept employment in this country, subject to certain limits. 8 C.F.R. § 274a.12(c)(9).

With this procedure in mind, some courts have held that aliens who have filed an I–485 application are authorized to be in the United States while that application is pending. *See United States v. Brissett*, 720 F.Supp. 90, 91 (S.D.Tex.1989) (“United States immigration regulations permit an applicant for adjustment of status to permanent resident ... to remain in the country pending disposition of the application.”); *Yesil v. Reno*, 958 F.Supp. 828, 843

(S.D.N.Y.1997) (“8 C.F.R. § 274a.12 ... does not explicitly state that an alien who applies for adjustment to lawful permanent resident status is lawfully in the United States during the pendency of the application, *1192 [but] the regulation certainly implies it.”).

Along similar lines, in dicta, we have stated that “[b]ecause aliens in the process of applying for legalization of their immigration status [pursuant to 8 U.S.C. §§ 1160 and 1255a] may not be deported, they are not unlawfully in the United States.” See *United States v. Hernandez*, 913 F.2d 1506, 1513–14 (10th Cir.1990) (holding that an alien was illegally in the United States under 18 U.S.C. § 922(g)(5) when he purchased a gun prior to seeking amnesty).¹² But see *United States v. Bazargan*, 992 F.2d 844, 848–49 (8th Cir.1993) (holding that an alien was subject to § 922(g)(5)'s firearm disability even though he had filed an asylum petition because “the grant of an employment authorization is not part of some larger determination by the INS permitting the alien to purchase weapons, regardless of other violations of his status.... [T]he employment authorization did not have the effect of converting Bazargan back into a legal alien.”)

In contrast, courts have consistently held that an alien is not authorized to be in the United States simply because an I–130 visa petition had been filed on his or her behalf and/or approved by the government. See *Der–Rong Chour v. INS*, 578 F.2d 464, 468 (2d Cir.1978) (“INS's approval of [an alien's] I–130 petition, moreover, does not ... permit him to remain in the United States.”); *Perales v. Casillas*, 903 F.2d 1043, 1048 (5th Cir.1990) (“[N]othing in the Immigration and Nationality Act immunizes a deportable alien from deportation when a visa petition [an I–130 petition] filed on his behalf is approved.”); cf. *Tongatapu Woodcraft Haw., Ltd. v. Feldman*, 736 F.2d 1305, 1308 (9th Cir.1984) (“It is important to note that a visa petition is not the same thing as a visa. An approved visa petition is

merely a preliminary step in the visa application process. It does not guarantee that a visa will be issued, nor does it grant the alien any right to remain in the United States.”) (emphasis omitted). Because an I–130 visa petition does not authorize an alien to stay in the United States, an alien may be subject to 18 U.S.C. § 922(g)(5)(A)'s firearm restriction regardless of whether an I–130 petition on his or her behalf has been filed or approved. See *United States v. Revuelta*, 109 F.Supp.2d 1170, 1174–75 (N.D.Cal.2000).¹³

In our case, Atandi's wife had filed an I–130 Petition for Alien Relative on Atandi's behalf and the government had approved that petition. Atandi had not yet sought permanent resident status by filing an I–485 application. We hold that Atandi's approved I–130 petition will not prevent the government from demonstrating that he was illegally or unlawfully present in *1193 the United States in May 2002, subject to federal firearms disabilities.

CONCLUSION

The record before us on appeal supports the government's claim that Atandi was illegally or unlawfully present in the United States for purposes of 18 U.S.C. 922(g)(5)(A) at the time he was discovered in possession of firearms and various ammunition. An alien's illegal presence in this country does not depend upon a formal removal order, and an I–130 petition does not authorize an alien to stay in the United States. Accordingly, we REVERSE the judgment of the district court dismissing the indictment against Atandi, and REMAND for further proceedings.

All Citations

376 F.3d 1186

Footnotes

- 1 For students present in the United States under an F–1 student visa, such as Atandi, “[d]uration of status is defined as the time during which an F–1 student is pursuing a full course of study at an educational institution.... The student is considered to be maintaining status if he or she is making normal progress toward completing a course of study.” 8 C.F.R. § 214.2(f)(5)(i).
- 2 Although Atandi's wife had applied for U.S. citizenship, at all times relevant to the instant case she was a lawful permanent resident.
- 3 18 U.S.C. § 922(g) reads, in relevant part: “It shall be unlawful for any person ... who, being an alien ... is illegally or unlawfully in the United States ... to ship or transport in interstate or foreign commerce, or possess in or affecting

commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.”

In the alternative, Atandi contends that he was permitted to stay in the United States not only because of his student status, but also because an I-130 petition had been filed on his behalf. We address this argument below in Part B.

Atandi contends that his failure to maintain student status is irrelevant under § 478.11 because he was originally “admitted” as a tourist, and only later obtained student status. This argument need not detain us long because the examples of illegal presence listed in this regulation are merely illustrative. See 27 C.F.R. § 478.11 (“The terms ‘includes’ and ‘including’ do not exclude other things not enumerated which are in the same general class.”). The test under § 478.11 is whether the alien was “in valid immigrant, nonimmigrant or parole status.” See *id.* As of May 2002, Atandi clearly was not.

In 2002, the Homeland Security Act amended 18 U.S.C. § 926(a), transferring the authority to implement certain gun control statutes from the Secretary of the Treasury to the Attorney General. See Pub. L. 107-296, § 1112(f)(6). This shift corresponded with ATF's move from the Department of the Treasury to the Department of Justice. See *id.* at § 1111.

This statute lists certain aliens who are ineligible to receive visas or be admitted to the United States. 8 U.S.C. § 1182(a). Among the aliens deemed inadmissible are (1) aliens “unlawfully present” for more than 180 days but less than one year who voluntarily left the United States and who seek reentry within three years of departure, and (2) aliens “unlawfully present” for a year or more who seek readmission within 10 years of departure. *Id.* at § 1182(a)(9)(B)(i). The September 1997 INS memorandum marked a change in course for the agency, which had previously taken the position that unlawful presence began to accrue under this statute upon a status violation.

An agency's internal interpretive guidelines do not warrant *Chevron* deference. See *Christensen v. Harris County*, 529 U.S. 576, 587, 120 S.Ct. 1655, 146 L.Ed.2d 621 (2000). The relevant statutory provision addressed in this INS memorandum is 8 U.S.C. § 1182(a)(9)(B)(ii), which states: “For purposes of this paragraph, an alien is deemed to be unlawfully present in the United States if the alien is present in the United States after the expiration of the period of stay authorized by the Attorney General or is present in the United States without being admitted or paroled.”

In the alternative, Atandi argues that he became authorized to be in the United States once removal proceedings were initiated and he posted bond. We disagree. The government's effort to remove an illegal alien does not somehow designate the alien as “lawfully” in the country for purposes of § 922(g)(5)(A) during the pendency of the removal proceedings.

Furthermore, we note that Atandi's interpretation of § 922(g)(5)(A) would lead to absurd results. We can envision no reason why Congress would grant illegal aliens the ability lawfully to arm themselves precisely at the moment the government commences its effort to remove them from the country.

A different procedure applies when an alien seeks permanent residence based on marriage to a U.S. citizen, as opposed to a lawful permanent resident. Such prospective immigrants are not subject to the numerical limits discussed above, and may therefore file an I-485 application together with the I-130 Petition for Alien Relative. See 8 U.S.C. §§ 1151(b)(2)(A)(i); 1255(a); 8 C.F.R. § 245.2.

8 C.F.R. § 245.1(g)(1) provides, in relevant part: “An alien is ineligible for the benefits of section 245 of the Act [to apply for an immigrant visa] unless an immigrant visa is immediately available to him or her at the time the application is filed. If the applicant is a preference alien, the current Department of State Bureau of Consular Affairs Visa Bulletin will be consulted to determine whether an immigrant visa is immediately available. An immigrant visa is considered available for accepting and processing the Form I-485[if] the preference category applicant has a priority date on the waiting list which is earlier than the date shown in the Bulletin (or the Bulletin shows that numbers for visa applicants in his or her category are current).”

We have doubts about the dicta in *Hernandez* suggesting that an amnesty applicant's authorization to seek employment in the United States is equivalent to authorization to reside in this country for purposes of § 922(g)(5). However, because it is only dicta and because the correctness or incorrectness of that statement is not dispositive in the instant case, we do not take the occasion either to affirm or disavow that language here. As we explain below, whatever the effect of a filed amnesty application or I-485 application, it is clear that an I-130 petition does not authorize an alien's presence in this country, and here Atandi had not filed an I-485 application at the time of the alleged firearm violation.

There is some dicta in *Lopez v. INS*, 758 F.2d 1390 (10th Cir.1985) that appears to confuse the I-130 and I-485 forms. We stated that “a United States citizen may obtain permanent residence for an alien spouse by filing a Form I-130 petition on behalf of the alien.” *Id.* at 1391 n. 1; see also *id.* at 1394. Actually, an I-485 application is also required, although when the alien's spouse is a U.S. citizen the two forms may be filed simultaneously. 8 U.S.C. § 1151(b)(2)(A)(i).

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Not Followed as Dicta U.S. v. Sprenger, 10th Cir.(Okla.), November 22, 2010

992 F.2d 844

United States Court of Appeals,
Eighth Circuit.UNITED STATES of America, Appellee,
v.
Homayoun BAZARGAN, Appellant.

No. 92-3058.

Submitted Feb. 15, 1993.

Decided May 11, 1993.

Synopsis

Foreign student was convicted in the United States District Court for the District of North Dakota, Rodney S. Webb, Chief Judge, of being illegal alien in possession of firearm. Student appealed. The Court of Appeals, Wollman, Circuit Judge, held that: (1) student became illegal alien by failing to comply with procedures for transferring to another college; (2) employment authorization received by student as consequence of asylum petition did not convert him back into legal alien; and (3) defense of entrapment by estoppel did not apply.

Affirmed.

West Headnotes (5)

[1] Aliens, Immigration, and Citizenship

Possession of firearm

Foreign student became “illegal alien” within meaning of statutory prohibition against illegal alien's possession of firearm, as soon as student failed to comply with procedure for transferring to another college and thereby failed to maintain F-1 student status. 18 U.S.C.A. § 922(g), (g)(5).

5 Cases that cite this headnote

[2] Aliens, Immigration, and Citizenship

Change of status

Nonimmigrant alien F-1 student becomes “illegal alien” subject to deportation by failing to comply with procedures for transferring to another school.

2 Cases that cite this headnote

[3] Aliens, Immigration, and Citizenship

Possession of firearm

Employment authorization received by foreign student as consequence of asylum petition did not convert him back into legal alien entitled to possess firearms after he failed to follow requirements for transferring to another college and thereby failed to maintain F-1 student status. 18 U.S.C.A. § 922(g), (g)(5).

4 Cases that cite this headnote

[4] Criminal Law

Particular Cases and Offenses

Foreign student's employment authorization as consequence of asylum petition did not give rise to “entrapment by estoppel” defense to charge of possessing firearm as illegal alien; Immigration and Naturalization Service (INS) never represented to student that past failure to maintain nonimmigrant F-1 student status was forgiven by employment authorization. 18 U.S.C.A. § 922(g), (g)(5).

16 Cases that cite this headnote

[5] Criminal Law

What Constitutes Entrapment

Defense of “entrapment by estoppel” applies when official tells defendant that certain conduct is legal and defendant believes official.

6 Cases that cite this headnote

Attorneys and Law Firms

*845 Jeff A. Bredahl, Fargo, ND, argued, for appellant.

Dennis Fisher, Asst. U.S. Atty., Fargo, ND, argued (Gary Annear, Asst. U.S. Atty., on the brief), for appellee.

Before BOWMAN, WOLLMAN, and HANSEN, Circuit Judges.

Opinion

WOLLMAN, Circuit Judge.

Homayoun Bazargan appeals from his conviction in district court¹ for being an illegal alien in possession of a firearm in violation of 18 U.S.C. §§ 922(g)(5), 924(a)(2). We affirm.

I.

On October 7, 1988, Bazargan was admitted to the United States as a nonimmigrant student,² status F-1, authorized to attend college at the University of Southern Mississippi, in Hattiesburg, Mississippi. From October until December 1988, Bazargan attended the University of Southern Mississippi. In January 1989, Bazargan transferred to Jackson State University in Jackson, Mississippi, where he attended classes until April 1989. Bazargan concedes that he failed to follow mandatory Immigration and Naturalization Service (INS) procedures when he transferred to Jackson State University. *See* 8 C.F.R. § 214.2(f)(8)(ii).

In May 1989, Bazargan submitted an application requesting asylum to the INS office in Arlington, Virginia. Pursuant to 8 C.F.R. § 208.7, the INS issues an employment authorization to every alien who files a non-frivolous asylum application and who requests the authorization. As a direct result of his asylum application, the INS issued Bazargan such an employment authorization, which it renewed in 1990, and which expired on May 7, 1991.

In the summer of 1989, Bazargan relocated to Fargo, North Dakota. In November 1989, Bazargan enrolled at Moorhead State University in Moorhead, Minnesota, just across the border from Fargo. Once again, Bazargan

failed to follow the mandatory INS procedures in transferring to Moorhead State.

In January 1991, INS Special Agent Robert Gudmestad sent Bazargan a letter requesting him to come to the INS's Fargo office for an interview and to bring his immigration documents with him. On February 5, 1991, Agent Gudmestad met with Bazargan, notified him of the denial of his asylum application, and served him with an order to show cause why he should not be deported. Agent Gudmestad explained the nature of the order to show cause to Bazargan and outlined the allegations contained in it. The allegations were, essentially, that Bazargan had violated the terms of his nonimmigrant alien F-1 student status. Gudmestad explicitly represented to Bazargan that the government considered him to be illegally present in the United States. Gudmestad further explained to Bazargan that the INS would soon hold a deportation hearing before an immigration judge in Bloomington, Minnesota. Gudmestad told Bazargan that he would *846 have to attend and that he had the right to testify and to present witnesses and evidence concerning why the government should not deport him. Gudmestad also informed Bazargan that he could renew his application for political asylum during the deportation hearing. Last, Gudmestad gave Bazargan a list of attorneys whom he could retain to represent him, without charge, at the upcoming deportation hearing.

In May 1991, Joseph Nahon, an agent with the Bureau of Alcohol, Tobacco, and Firearms in Fargo, North Dakota, received a "Report of Multiple Sales or Other Disposition of Pistols and Revolvers," filed by one Neil Scherr of Fargo, showing that Bazargan had purchased two pistols within a period of five business days. Nahon then obtained a National Crime Information Center printout on Bazargan. The printout revealed that Bazargan had been detained by the INS for an immigration violation on February 5, 1991.

On May 7, 1991, Agent Nahon visited Scherr, the licensed firearm dealer who had sold Bazargan the two pistols and had completed the multiple sales form. Scherr confirmed that he had in fact sold Bazargan two Raven MP-25, .25 caliber semi-automatic pistols on April 8, 1991.

Later that same day, Agent Nahon located Bazargan in the vicinity of Moorhead State. Nahon advised Bazargan that he was not under arrest and had no obligation to

talk, but requested an interview. The two men proceeded to Bazargan's residence, where Bazargan showed Nahon the two Raven .25 caliber pistols, a Heckler & Koch nine millimeter semi-automatic pistol, ninety-nine rounds of .25 caliber ammunition, and seventy-nine rounds of nine millimeter ammunition. Bazargan also informed Nahon that he had recently sold a Beretta Carcano 6.5 millimeter bolt-action rifle (described in the indictment as a "6.5 caliber") to a man named Jerry in a nearby building. Bazargan then turned the three guns and all of the ammunition over to Nahon.

Subsequent investigation by Agent Nahon revealed that Bazargan had purchased the Heckler & Koch nine millimeter semi-automatic pistol on November 20, 1990, and the Beretta rifle in April 1991.

On June 26, 1991, Bazargan was charged in a five-count indictment with three counts of knowingly making a false and fictitious written statement on a Firearms Transaction Record Form 4473, in violation of 18 U.S.C. §§ 922(a)(6) and 924(a)(1)(B) (Counts One, Two, and Three), one count of being an illegal alien unlawfully in possession of firearms, in violation of 18 U.S.C. §§ 922(g)(5) and 924(a)(2) (Count Four), and one count charging the willful sale and delivery of a firearm by an unlicensed person to an unlicensed resident of another state, in violation of 18 U.S.C. §§ 922(a)(5) and 924(a)(1)(D) (Count Five). Bazargan filed a motion to dismiss the indictment, and the district court stayed its decision on the motion pending the outcome of Bazargan's asylum application.

On January 15, 1992, Immigration Judge Robert D. Vinikoor granted Bazargan's request for asylum. On March 16, 1992, the district court granted Bazargan's motion to dismiss Counts I through IV of the indictment, based upon the one-page "Memorandum of Oral Decision" in Bazargan's asylum case.

On April 3, 1992, the United States filed a motion for reconsideration of the district court's order of March 16, 1992, based upon Judge Vinikoor's subsequently-issued eleven-page decision. Judge Vinikoor included a footnote stating that Bazargan had been an illegal alien at the time he had left school in Mississippi and had violated the terms of his F-1 student status by not complying with required INS procedures. *See* Oral Decision of Immigration Judge Robert D. Vinikoor of January 15, 1992, at 4, n. 2. The district court granted the United States' motion and

vacated its previous order dismissing Counts I through IV of the indictment.

A jury found Bazargan guilty only on Count IV, the charge of being an illegal alien in possession of a firearm. The district court sentenced Bazargan to five months' imprisonment, with the recommendation that he be placed in a minimum security facility, to be followed by placement in a community treatment center for a period not to exceed *847 five months, to be followed by a term of two years' supervised release.

II.

[1] On appeal, Bazargan raises two issues: that he was not an illegal alien at the time he possessed the firearms and, in the alternative, that if he was an illegal alien at the time he possessed the firearms, the government cannot prosecute him on the firearms charge because of the defense of "entrapment by estoppel," allegedly arising from the government's issuance of an employment authorization to him. We examine these contentions in turn.

Title 18, United States Code, section 922(g) provides, in pertinent part:

It shall be unlawful for any person

.....

(5) who, being an alien, is illegally or unlawfully in the United States;

.....

to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

Because the three firearms in this case indisputably were shipped in interstate commerce, the only issue the jury had to determine was whether Bazargan was an alien "illegally or unlawfully in the United States" at the time he bought or possessed the firearms. *See* 18 U.S.C. § 922(g)(5). To resolve this question, we address two subsidiary issues: (1) whether Bazargan, as a nonimmigrant alien F-

1 student, became an alien “illegally or unlawfully in the United States” upon failing to follow the INS regulations concerning transferring between schools; and (2) if so, whether Bazargan's employment authorization, which arose from his asylum application and which expired on May 7, 1991, rendered him legally in the United States until its expiration.

A nonimmigrant alien F-1 student who wishes to transfer from the school specified in his visa must satisfy the transfer procedure requirements set forth in 8 C.F.R. § 214.2(f)(8). Title 8 C.F.R. § 214.2(f)(8) requires the student to, *inter alia*, (1) obtain a properly completed Form I-20A-B from the school to which he intends to transfer; (2) inform the school that he is currently attending of his intention to transfer; and (3) after completing the student's portion, submit the Form I-20A-B to the new school within fifteen days after the date he begins classes at the new school.

[2] A nonimmigrant alien F-1 student becomes an illegal alien subject to deportation by failing to comply with the transfer procedures set forth in the INS regulations. *See Youssefinia v. INS*, 784 F.2d 1254, 1256 (5th Cir.1986); *Mohammadi-Motlagh v. INS*, 727 F.2d 1450, 1453 (9th Cir.1984); *Kavasji v. INS*, 675 F.2d 236, 239 (7th Cir.1982). The requirement of notifying the INS of the school to which the nonimmigrant alien intends to transfer “has been identified by the INS as an essential tool, the lax enforcement of which would severely hamper its obligation to keep track of the thousands of alien students within our borders.” *Ghorbani v. INS*, 686 F.2d 784, 786 (9th Cir.1982), *citing Matter of Yazdani*, 17 I & N Dec. 626 (BIA 1981).

If a nonimmigrant alien F-1 student violates his status by failing to follow the transfer procedures set forth in 8 C.F.R. § 214.2(f)(8)(ii), he may apply to the district director of the INS for reinstatement to student status by following the procedures provided in 8 C.F.R. § 214.2(f)(16). Title 8 C.F.R. § 214.2(f)(16) provides in pertinent part:

Reinstatement to student status—

(i) General. A Service director may consider reinstating an F-1 student who makes a request for reinstatement on Form I-539, Application to Extend Time of Temporary Stay, accompanied by a properly completed

Form I-20A-B from the school the student is attending or intends to attend, if the student:

(A) Establishes to the satisfaction of the Service director that the violation of status resulted from circumstances beyond the student's control or that failure to receive reinstatement to lawful F-1 status would result in extreme hardship to the student;

*848 (B) Is currently pursuing ... a full course of study at the school which issued the Form I-20A-B;

(C) Has not engaged in unauthorized employment....

Bazargan admits that he failed to follow the requirements of 8 C.F.R. § 214.2(f)(8) when he transferred to Jackson State from the University of Southern Mississippi in January 1990. Bazargan also concedes that at no time thereafter did he apply to the INS for a reinstatement to his nonimmigrant alien F-1 student status, pursuant to 8 C.F.R. § 214.2(f)(16). Accordingly, we agree with the district court, which properly deferred to the Immigration Judge, in holding that Bazargan's status as a nonimmigrant alien F-1 student lawfully in the United States terminated in early 1990. *See Oral Decision of Immigration Judge Robert D. Vinikoor of January 15, 1992*, at 4, n. 2. As soon as he failed to maintain his F-1 student status, Bazargan became “without authorization to remain in this country,” and “in the same position legally as the alien who wades across the Rio Grande or otherwise enters the United States without permission.” *United States v. Igbatayo*, 764 F.2d 1039, 1040 (5th Cir.1985).

[3] Thus, the next issue before us is whether the INS's grant of an employment authorization to Bazargan as a consequence of his asylum petition made him a legal alien for the purposes of 18 U.S.C. § 922(g)(5) during the period of time that he possessed the firearms. For the purposes of a section 922(g)(5) conviction, “the government must prove that the alien was in the United States without authorization at the time the firearm was received.” *United States v. Hernandez*, 913 F.2d 1506, 1513 (10th Cir.1990). Bazargan argues that because the employment authorization “authorized” him to work in the United States until May 7, 1992, he was not “without authorization.”

Although the question is a close one, we do not agree with Bazargan's position. Our standard of review “is a

narrow one, deferential to the agency's interpretation of its own regulations and only permitting reversal if the agency action is without a rational basis.' ” *State of Missouri v. United States Dep't of Education*, 953 F.2d 372, 375 (8th Cir.1992), *quoting Education Assistance Corp. v. Cavazos*, 902 F.2d 617, 622 (8th Cir.1990). The Immigration Judge, in the course of granting Bazargan's petition for asylum, held that Bazargan had been an illegal alien at the time he had possessed the firearms and that the application for asylum and the employment authorization had not cured this defect in status. Because we cannot say that this determination was without a rational basis, we uphold the district court's finding that Bazargan was an illegal alien at the time he possessed the firearms.

Bazargan's failure to apply for reinstatement to F-1 status pursuant to 8 C.F.R. § 214.2(f)(16) further supports the district court's holding. The INS has provided this means for nonimmigrant students who, for whatever reason, become illegal by failing to maintain the requirements of their status. Bazargan has failed at any time relevant to this prosecution to apply for a reinstatement. Consequently, Bazargan remained in violation of his student status until January 15, 1992, when his petition for asylum was granted.

Moreover, it would be contrary to the purpose of the immigration laws to permit Bazargan to use one INS regulation, 8 C.F.R. § 208.7, the procedure governing the issuance of employment authorizations to asylum applicants, to defeat another INS regulation, 8 C.F.R. § 214.1(f)(8), requiring the alien to notify the INS of any school transfers. The INS is required to grant an employment authorization to any alien who has requested it and has filed a non-frivolous application for asylum. 8 C.F.R. § 208.7. Such a request is granted routinely, to avoid creating a situation in which the applicant alien must choose either to rely “on friends and relatives for support, to work illegally and risk deportation or adverse action on his asylum application, or, ultimately, to abandon his application for asylum.” *Ramos v. Thornburgh*, 732 F.Supp. 696, 699 (E.D.Tex.1989). Consequently, the grant of an employment authorization is not part of some larger determination by the INS permitting the alien to purchase weapons, regardless of other violations of his status. Indeed, it ***849** would be unreasonable for the employment authorization to erase all violations of an immigrant's status. At the time the INS issues the employment authorization, it has not

even fully reviewed the alien's asylum application, but simply has determined it to be non-frivolous. Because the INS does not interpret the employment authorization to have any effect on the alien's status with respect to anything other than his ability to engage in employment during the pendency of his case, we agree with the district court and the Immigration Judge that the employment authorization did not have the effect of converting Bazargan back into a legal alien.

[4] Last, we consider Bazargan's argument that if we find that he had become an illegal alien at the time he possessed the firearms, the doctrine of “entrapment by estoppel” precludes his prosecution on the section 922(g)(5) charge. Bazargan contends that because the government had issued him an employment authorization permitting him to stay in the United States until it expired on May 7, 1991, the government entrapped him into believing he was lawfully residing in the United States at the time of the charged offense.

[5] The defense of entrapment by estoppel “ ‘applies when an official tells the defendant that certain conduct is legal and the defendant believes the official.’ ” *United States v. Long*, 977 F.2d 1264, 1270–71 (8th Cir.1992), *quoting United States v. Austin*, 915 F.2d 363, 366 (8th Cir.1990). We have noted that “[n]either the Supreme Court nor this Court has decided whether equitable estoppel can apply against the Government in immigration cases.” *Wellington v. INS*, 710 F.2d 1357, 1360 (8th Cir.1983). If “estoppel is available in immigration cases, it can be invoked only if the government is guilty of ‘affirmative misconduct.’ ” *Wellington*, 710 F.2d at 1360.

The defense of “entrapment by estoppel” has no application to Bazargan's case. At no time did the INS represent to Bazargan that his past failure to maintain his nonimmigrant F-1 student status was forgiven by the employment authorization. The only situation in which Bazargan could conceivably make a colorable estoppel claim with respect to the employment authorization would be if the government had prosecuted him for working during the period of the authorization. Far from reassuring him that he was a legal alien, the INS had served Bazargan with an order to show cause why he should not be deported for violations of his nonimmigrant student F-1 status before he had purchased the firearms. Likewise, Agent Gudmestad had also advised Bazargan

orally that the INS considered him illegally present in the United States due to his violation of student status. Accordingly, Bazargan's claim that he was misled by the INS into believing that he was "legally here" for the purposes of purchasing firearms is without merit.

The judgment of the district court is affirmed.

All Citations


992 F.2d 844

Footnotes

- 1 The Honorable Rodney S. Webb, Chief Judge, United States District Court for the District of North Dakota.
- 2 A nonimmigrant student is an alien who has no intent of abandoning his permanent residence in his home country, but is present in the United States temporarily for the purpose of pursuing a course of study. See 8 U.S.C. § 1101(a)(15)(J).

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Declined to Extend by U.S. v. Flores, 5th Cir.(Tex.), March 16, 2005

764 F.2d 1039

United States Court of Appeals,
Fifth Circuit.

UNITED STATES of America, Plaintiff-Appellee,

v.

Samuel Aderemi IGBATAYO, Defendant-Appellant.

No. 84-2621

|
Summary Calendar.

|
June 19, 1985.

Synopsis

Defendant was convicted in the United States District Court for the Southern District of Texas, Hayden W. Head, Jr., J., of making false statement in connection with acquisition of firearm, and he appealed. The Court of Appeals held that defendant, a Nigerian national who failed to maintain student status required by his visa, was “illegal alien” prior to date that he was actually ordered deported, and thus could be convicted for stating in firearm purchase form, prior to deportation, that he was not “illegally in the United States.”

Affirmed.

West Headnotes (1)

[1] Weapons

 False statements to dealers

Nigerian national who failed to maintain student status required by his visa was “illegal alien” prior to date that he was actually ordered deported; thus, he could be convicted of making false statement in connection with acquisition of firearm for stating in firearm purchase form, prior to deportation, that he was not “illegally in the United States.” 18 U.S.C.A. § 922(a)(6); Immigration and Nationality Act, §§ 101(a)(15)(F)(i), 241(a)(9), 8 U.S.C.A. §§ 1101(a)(15)(F)(i), 1251(a)(9).

Attorneys and Law Firms

Rene Rodriguez (Court appointed), Corpus Christi, Tex., for defendant-appellant.

Henry K. Oncken, U.S. Atty., Susan L. Yarbrough, James R. Gough, Asst. U.S. *1040 Attys., Houston, Tex., for plaintiff-appellee.

Appeal from the United States District Court for the Southern District of Texas.

Before GEE, JOHNSON and DAVIS, Circuit Judges.

Opinion

PER CURIAM:

Samuel Aderemi Igbatayo appeals his conviction for violation of 18 U.S.C. § 922(a)(6), which makes it unlawful “for any person in connection with the acquisition or attempted acquisition of any firearm [from a licensed dealer] knowingly to make any false or fictitious oral or written statement ... intended or likely to deceive such [dealer] with respect to any fact material to the lawfulness of the sale....” This conviction came about in the following fashion: In 1981 Igbatayo, a Nigerian national, was admitted to the United States on student non-immigrant status. This status was to continue until December 20, 1984, and was conditioned on his pursuing a full course of study. See 8 U.S.C. § 1101(a)(15)(F)(i); 8 C.F.R. § 214.2(f)(5)-(6) (1985). Igbatayo received a master's degree from the Texas Arts and Industry University in December 1982; after receiving this degree he did not re-enroll as a full-time student, but remained in the United States. In February 1984, Igbatayo ordered a .22 caliber rifle from Paul Basca, a federally-licensed firearms dealer. In conjunction with this purchase, Igbatayo completed Alcohol, Tobacco, and Firearms Division Form 4473, on which question 8(g) asks whether the purchaser of the firearm is an alien “illegally in the United States.” Igbatayo answered this question in the negative. On May 24, 1984, an immigration judge ordered Igbatayo's deportation as a result of his failure to maintain student status as required by his visa.

Igbatayo was indicted and convicted by a jury on the basis of his negative answer to question 8(g) on form 4473. The only issue of any note which Igbatayo raises in this appeal is whether he was an “illegal alien” prior to the date that he was actually ordered deported. Igbatayo argues that the language of 8 U.S.C. § 1251(a)(9), which provides “Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who-... was admitted as a non-immigrant and failed to maintain the non-immigrant status in which he was admitted ...,” merely renders him “deportable,” not “illegal.”

This argument is not convincing. Although the Immigration and Nationality Act, 8 U.S.C. § 1101 et seq., does not define the term “illegal alien,” it is clear that an alien who is in the United States without authorization is in the country illegally. After failing to maintain the student status required by his visa, Igbatayo was without authorization to remain in this country. He thus was in

the same position legally as the alien who wades across the Rio Grande or otherwise enters the United States without permission.

Igbatayo's challenges to the sufficiency of the evidence supporting his conviction are also without merit. His challenge to the sufficiency of the information under which he was charged also fails, since it is clear that read as a whole and in a practical fashion, the information gave Igbatayo entirely adequate notice of the charge and its elements. See *Hamling v. United States*, 418 U.S. 87, 117, 94 S.Ct. 2887, 2907, 41 L.Ed.2d 590 (1974); *United States v. Lennon*, 751 F.2d 737, 743 (5th Cir.1985).

AFFIRMED.

All Citations

764 F.2d 1039

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Fiscal Year 2016 Entry/Exit Overstay Report



Homeland
Security

Message from the Secretary

I am pleased to present the following “Fiscal Year 2016 Entry/Exit Overstay Report” prepared by the U.S. Department of Homeland Security (DHS). Pursuant to the requirement contained in Section 2(a) of the *Immigration and Naturalization Service Data Management Improvement Act of 2000* (Pub. L. No. 106-215), House Report 114-668, and Senate Report 114-264, DHS is submitting this report on overstay data.



DHS has generated this report to provide data on departures and overstays, by country, for foreign visitors to the United States who were expected to depart in Fiscal Year (FY) 2016 (October 1, 2015 - September 30, 2016).

This report is being provided to the following Members of Congress:

The Honorable Thad Cochran
Chairman, Senate Committee on Appropriations

The Honorable Patrick J. Leahy
Ranking Member, Senate Committee on Appropriations

The Honorable Rodney Frelinghuysen
Chairman, House Committee on Appropriations

The Honorable Nita Lowey
Ranking Member, House Committee on Appropriations

The Honorable Charles E. Grassley
Chairman, Senate Committee on Judiciary

The Honorable Dianne Feinstein
Ranking Member, Senate Committee on Judiciary

The Honorable Bob Goodlatte
Chairman, House Committee on Judiciary

The Honorable John Conyers, Jr.
Ranking Member, House Committee on Judiciary

The Honorable Ron Johnson
Chairman, Senate Committee on Homeland Security and Governmental Affairs

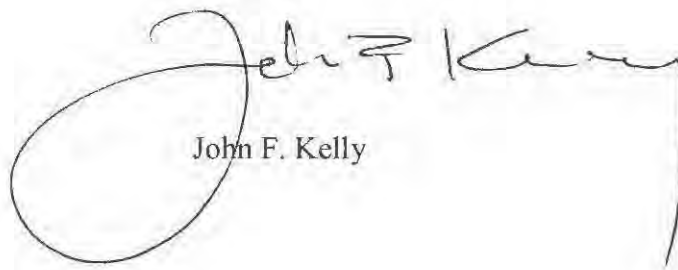
The Honorable Claire McCaskill
Ranking Member, Senate Committee on Homeland Security and Governmental Affairs

The Honorable Michael McCaul
Chairman, House Committee on Homeland Security

The Honorable Bennie G. Thompson
Ranking Member, House Committee on Homeland Security

Inquiries relating to this report may be directed to the DHS Office of Legislative Affairs at (202) 447-5890.

Sincerely,

A handwritten signature in black ink, appearing to read "John F. Kelly". The signature is stylized with a large, looping "J" and a long, sweeping "y" at the end. The name "John F. Kelly" is printed in a standard serif font directly beneath the signature.

John F. Kelly

Executive Summary

This report provides data on departures and overstays, by country, for foreign visitors to the United States who entered as nonimmigrant visitors through an air or sea Port of Entry (POE) and who were expected to depart in FY 2016 (October 1, 2015 - September 30, 2016).

DHS continues to make significant progress by enhancing its ability to identify and quantify nonimmigrants who have stayed beyond their lawful period of admission. During the past year, DHS has improved its data sharing, which made it possible to include additional nonimmigrant classes of admissions in this year's report. The FY 2016 report covers significantly expanded classes of admission, compared with the FY 2015 DHS Entry and Exit Overstay Report.¹ While the focus of last year's report was on business or pleasure travelers to the United States, and those traveling under the Visa Waiver Program (VWP), this year's report also includes student travelers, worker classifications, and other classes of admission (a detailed list of categories is listed in Appendix A of this report). With the addition of these classes of admission, this report accounts for 96.02 percent² of all air and sea nonimmigrant admissions to the United States in FY 2016. U.S. Customs and Border Protection (CBP) will continue to build upon this work in future reports by refining data, including more information from the land border, and adding biometric confirmation of the biographic overstays indicated in this report.

An overstay is a nonimmigrant who was lawfully admitted to the United States for an authorized period, but remained in the United States beyond his or her lawful period of admission. The lawful admission period can be a fixed period, or based on completion of a certain activity, such as a student seeking a college degree. DHS identifies two types of overstays: 1) individuals for whom no departure has been recorded (Suspected In-Country Overstays), and 2) individuals whose departure was recorded after their lawful period of admission expired (Out-of-Country Overstays).

It is important to note that determining lawful status is more complicated than solely matching entry and exit data. For example, a person may receive from CBP a six-month admission upon entry, and then he or she may subsequently receive from U.S. Citizenship and Immigration Services (USCIS) a six-month extension. Identifying extensions, changes, or adjustments of status is necessary to determine whether a person is truly an overstay.

Valid periods of admission to the United States vary; therefore, it was necessary to establish "cutoff dates" for the purposes of a written report. Unless otherwise noted, the tables accompanying this report refer to departures that were expected to occur between October 1, 2015 and September 30, 2016.

¹ U.S. Department of Homeland Security. *Entry/Exit Overstay Report, Fiscal Year 2015*, Jan 2016. Accessible at <https://www.dhs.gov/sites/default/files/publications/FY%2015%20DHS%20Entry%20and%20Exit%20Overstay%20Report.pdf>

² Appendix B details the 3.98 percent not accounted for in this report. More than 95 percent of that total are the C or D category (in-transit aliens/airline crewmembers) whose records are difficult to quantify due to the frequency of arrivals and departures close together in time. CBP will continue to improve its ability to report these numbers.

This report analyzes the overstay rates to provide a better understanding of those who overstay and remain in the United States beyond their period of admission with no evidence of an extension to their period of admission or adjustment to another immigration status. DHS has determined that there were 50,437,278 in-scope nonimmigrant admissions³ to the United States through air or sea POEs who were expected to depart in FY 2016, which represents the majority of annual nonimmigrant admissions. Of this number, DHS calculated a total overstay rate of 1.47 percent, or 739,478 individuals. In other words, 98.53 percent of the in-scope nonimmigrant visitors departed the United States on time and abided by the terms of their admission.

This report breaks down the overstay rates further to provide a better picture of those overstays who remain in the United States beyond their period of admission and for whom there is no identifiable evidence of a departure, an extension of period of admission, or transition to another immigration status. At the end of FY 2016, there were 628,799 Suspected In-Country Overstays. The overall Suspected In-Country Overstay rate for this scope of travelers is 1.25 percent of the expected departures.

Due to continuing departures and adjustments in status by individuals in this population, by January 10, 2017, the number of Suspected In-Country Overstays for FY 2016 decreased to 544,676, rendering the Suspected In-Country Overstay rate as 1.07 percent. In other words, as of January 10, 2017, DHS has been able to confirm the departures or adjustment in status of more than 98.90 percent of nonimmigrant visitors scheduled to depart in FY 2016 via air and sea POEs, and that number continues to grow.

This report separates VWP country overstay numbers from non-VWP country numbers. For VWP countries, the FY 2016 Suspected In-Country Overstay rate is 0.60 percent of the 21,616,034 expected departures. For non-VWP countries, the FY 2016 Suspected In-Country Overstay rate is 1.90 percent of the 13,848,480 expected departures.

Part of the nonimmigrant population in this year's report includes visitors who entered on a student or exchange visitor visa, F, M, or J visa, respectively. DHS has determined there were 1,457,556 students and exchange visitors scheduled to complete their program in the United States. However, 5.48 percent stayed beyond their authorized window for departure at the end of their program.

For Canada, the FY 2016 Suspected In-Country Overstay rate is 1.33 percent of 9,008,496 expected departures. For Mexico, the FY 2016 Suspected In-Country Overstay rate is 1.52 percent of 3,079,524 expected departures. Consistent with the methodology for other countries, this represents only travel through air and sea POEs and does not include data on land border crossings.

DHS will continue to improve its data collection, both biographic and biometric, on travelers departing the United States, and will continue to release this report publicly, at a minimum, on an annual basis. With respect to biometric exit collection, CBP has undertaken multiple biometric

³ See Appendix A for a full list defining "In-Scope nonimmigrant classes of admission."

exit tests since 2013 to develop a successful, comprehensive concept of operations for biometric exit. In June 2016, CBP implemented the first operational facial biometric exit field trial at Hartsfield-Jackson Atlanta Airport (ATL) adding to CBP's biometric exit verification capability that utilizes mobile devices to biometrically verify departure during targeted outbound operations.

CBP will implement biometric exit in the air environment in three phases beginning with phase one, which is represented by the recently implemented ATL solution. In phase two, CBP will build out the enterprise services and end-state biometric exit solutions. Phase three will include scaling the data infrastructure to support full biometric exit.



FY 2016 Entry/Exit Overstay Report

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I. Legislative Language

This document responds to the legislative language set forth in Section 2(a) of the *Immigration and Naturalization Service Data Management Improvement Act of 2000* (Pub. L. No. 106-215), House Report 114-668, and Senate Report 114-264.

Section 2(a), amending section 110 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, states:

“(e) REPORTS —

“(1) IN GENERAL — Not later than December 31 of each year following the commencement of implementation of the integrated entry and exit data system, the Attorney General shall use the system to prepare an annual report to the Committees on the Judiciary of the House of Representatives and of the Senate.

“(2) Information — Each report shall include the following information with respect to the preceding fiscal year, and an analysis of that information:

(A) The number of aliens for whom departure data was collected during the reporting period, with an accounting by country of nationality of the departing alien.

(B) The number of departing aliens whose departure data was successfully matched to the alien’s arrival data, with an accounting by the alien’s country of nationality and by the alien’s classification as an immigrant or nonimmigrant.

(C) The number of aliens who arrived pursuant to a nonimmigrant visa, or as a visitor under the visa waiver program under section 1187 of this title, for whom no matching departure data have been obtained through the system or through other means as of the end of the alien’s authorized period of stay, with an accounting by the alien’s country of nationality and date of arrival in the United States.

(D) The number of lawfully admitted nonimmigrants identified as having remained in the United States beyond the period authorized by the Attorney General, with an accounting by the alien’s country of nationality.

House Report 114-668 states:

The Committee directs subsequent reporting to include other visa categories, such as students, as well as data from entrants at all ports of entry, including the land environment. In addition, the Committee believes subsequent reports should include an estimate of the average duration of overstay to provide greater context as to the extent of the problem. The Department is directed to submit a report to the Committee for all fiscal year 2016 visa overstays, not later than 30 days after the end of fiscal year 2016.

Senate Report 114-264 states:

While the Committee continues to expect that the Department will provide the report on an annual basis, the bill again includes language directing submission of the overstay report and withholding \$13,000,000 from obligation for the Office of the Secretary and Executive Management until this report has been submitted.

II. Background

The purpose of this report is to identify the FY 2016 country-by-country overstay rates for all air and sea in-scope⁴, nonimmigrant classes of admission.

The overstay identification process is conducted utilizing arrival, departure, and immigration information, which is consolidated to generate a complete travel history for individuals who traveled, and were subsequently admitted, to the United States, as described below.

CBP receives passenger manifests for arrivals to and departures from the United States via commercial sea and air carriers, in addition to private aircraft. These manifests indicate who is aboard the aircraft or vessel. In the land environment, CBP receives travel data on third-country nationals departing to Canada. Additionally, CBP is able to reconcile a significant portion of travelers who arrive through our borders with both Canada and Mexico, since the majority of those travelers are frequent crossers and CBP is able to close a previous arrival when recording a new arrival.

CBP officers interview travelers upon arrival in the United States to determine the purpose and intent of travel. CBP officers collect biographic information on all nonimmigrants applying for admission and confirm the accuracy of the biographic manifest data provided by the carriers, which are subject to fines for any missing or inaccurate data. For most foreign nationals, CBP also collects fingerprints and digital photographs⁵ to biometrically match against data previously provided to the United States. In addition, CBP strengthened the document requirements at air, land, and sea POEs by reducing the number of accepted travel documents that one may use to enter the United States,⁶ which increased CBP's ability to quickly and accurately collect information about arriving aliens, particularly at the land borders.

For departing travelers, air and sea carriers provide biographic manifest data for all travelers prior to leaving the United States. Federal law requires the carriers to provide specific sets of data, which include name and passport number, and the carriers are subject to fines for missing or inaccurate data. CBP then matches these biographic departure data against arrival data to determine who has complied with the terms of admission and who has overstayed. CBP maintains a separate system specifically for this purpose. This system also receives other DHS data relevant to whether a person is lawfully present, such as immigration benefit information or information on student visitors to the United States.

The United States did not build its border, aviation, and immigration infrastructure with exit processing in mind. Consequently, airports in the United States do not have areas designated exclusively for travelers leaving the United States. Instead, traveler departures are recorded biographically using outbound passenger manifests provided by commercial carriers. Under the Advance Passenger Information System legislation, carriers are required to validate the manifest

⁴ See Appendix A for a full list defining "In-Scope nonimmigrant classes of admission"

⁵ 8 C.F.R. §235.1(f)(1)(ii)

⁶ The Western Hemisphere Travel Initiative is a joint U.S. State Department/DHS initiative that implemented §7209 of the Intelligence Reform and Terrorism Prevention Act of 2004 (Pub. L. No. 108-458), which limited the documents that could be used to enter the United States.

against the travel document presented by the traveler before he or she is permitted to board their aircraft or sea vessel. DHS is also implementing a biometric-based departure program to complement the biographic data collection that already exists.

Travelers arrive at land POEs via various modes of transportation, including cars, trains, buses, ferries, bicycles, trucks, and foot. There are major physical, logistical, and operational obstacles to collecting an individual's biographic and biometric data upon departure. Due to the existing limitations in collecting departure data in the land environment, this report provides limited departure and overstay information for land POEs; when used it is primarily to match records of individuals arriving by air and sea to those that may have subsequently departed by land to Canada. DHS anticipates developing the ability to provide a broader scope of data in future reports. CBP has ongoing efforts, described in this report, which will continue to improve the existing process and availability of departure data.

III. Existing Operations

A. Air and Sea Environments

Today, in the air and sea environments, CBP obtains entry records through both carrier-provided manifest data and inspections conducted by CBP Officers (CBPOs). CBP obtains biographic data on travelers who lawfully enter or depart the United States by air or sea.⁷ Federal law requires air and sea carriers to submit passenger manifests to CBP, which are then recorded as arrivals to, or departures from, the United States.⁸ Air carriers are required to provide data not solely on who has made a reservation for a particular flight, but who is actually on the aircraft at the time the aircraft departs.⁹ Airlines are subject to fines for making errors regarding who is or is not on any particular aircraft.¹⁰

While CBP currently obtains biographic arrival and departure information on almost all foreign nationals in the air and sea environments, and biometric entry data in the air environment, CBP is committed to continuously improving existing biometric and biographic exit and entry processes. These initial biometric exit processes are providing new opportunities to verify an individual's identity and facilitate collection of new biographic information on individuals where none previously existed.

1. Biometric Exit Mobile (BE-Mobile)

During the summer of 2015, CBP deployed mobile fingerprint collection devices to outbound teams at the top 10 airports.¹¹ CBP completed the BE-Mobile survey in FY 2016, which validated the performance of CBP's biographic-based traveler departure records, in addition to identifying and quantifying the benefits of adding biometrics to support recording departure records. While this technology was used for survey purposes to inform CBP's strategy for future biometric exit deployments, CBPOs use these devices as a law enforcement tool in the regular course of their duties. When used in the outbound air environment, CBP records biometrics collected from travelers who are in-scope for biometric exit requirements as a biometric exit record. During FY 2016, this generated 37,640 biometric exit records, which represents 0.09 percent of the total international air departures at the top 10 airports. The BE-Mobile technology provides a significant law enforcement value for CBPOs and continues to support CBP law enforcement operations. CBP anticipates BE-Mobile technology will continue to be an important tool supporting the biometric exit mission moving forward.

⁷ In addition, the Department obtains biometric information on all nonimmigrants who enter the United States via air and sea, except for those who are exempt by regulation, which includes those over the age of 79 or under 14, diplomats, and certain other discrete categories. See 8 C.F.R. §§ 235.1(f)(1)(ii); 235.1(f)(1)(iv).

⁸ 8 C.F.R. § 231.1, (describing the specific data elements for each passenger that carriers are required to provide).

⁹ 19 C.F.R. §§ 122.49a; 122.75a.

¹⁰ 8 U.S.C. § 1221(g).

¹¹ Currently BE-Mobile technology is used at the following airports: Chicago O'Hare International Airport, Hartsfield-Jackson Atlanta International Airport, John F. Kennedy International Airport, Newark Liberty International Airport, Los Angeles International Airport, San Francisco International Airport, Miami International Airport, Dallas/Fort Worth International Airport, Washington Dulles International Airport, and George Bush Intercontinental Airport.

2. Biometric Exit Field Trial

CBP, in partnership with an airline, deployed a biometric exit field trial in June 2016 at ATL. The field trial was designed using existing CBP systems, leveraging data already provided to CBP by the traveler and airlines to match against collected biometrics. Additionally, the field trial was designed to support existing business practices of airlines and within infrastructure restraints at U.S. airports. Furthermore, the field trial provided the opportunity to test new technologies focused on collecting biometric data from departing air travelers. In December 2016, this test moved into an operational deployment. Today, this technology is recording biometric exit records for a limited number of daily international flights. Through this effort, CBP is fusing biometric and biographic data on departing travelers. CBP plans to expand this technology to additional flights during FY 2017.

B. Land Environment

The collection of departure information in the land environment is more difficult than in the air and sea environments due to the major physical, logistical, and operational obstacles involved with electronically collecting an individual's biographic and biometric data. Additionally, in the land environment, it is not feasible to obtain advance reporting of arrivals and departures, as the majority of travelers cross the borders using their own vehicle or as a pedestrian.

1. Northern Border

On the Northern border, CBP is addressing this limitation through a partnership with the Canada Border Services Agency. The Beyond the Border declaration¹², implemented in 2013, allows for an entry and exit initiative under which Canada and the United States have agreed to exchange biographic entry records for land crossings between the two countries, so that an entry into one is recorded as an exit from the other.

On June 30, 2013, Canada and the United States began exchanging biographic entry data for third-country nationals, permanent residents of Canada, and United States lawful permanent residents who enter through land POEs along the shared border where information is collected electronically. Because of this initiative, the United States now has a working biographic land border exit system on its Northern border for non-Canadian citizens. Upon resolution of pending legal issues, Canada and the United States plan to share data on Canadians who cross the northern border. Once this is complete, CBP will release overstay rates for those who cross the northern border by land.

CBP currently matches 99 percent of the entry information received from Canada to an entry in the Arrival and Departure Information System (ADIS). To date, this data-sharing agreement has led to 13.1 million departure records. CBP uses this information to resolve previous traveler air or sea arrivals into the United States for those cases where the traveler may then subsequently

¹²United States-Canada Beyond the Border: A Shared Vision for Perimeter Security and Economic Competitiveness, Action Plan, Dec. 2011. Accessible at http://www.whitehouse.gov/sites/default/files/us-canada_btb_action_plan3.pdf.

depart by land to Canada. Both countries are expanding the program to include all travelers including citizens in the future. Through these improvements, as well as ongoing work improving the collection and analysis of crossing data along the Northern border, future reports will expand reporting in this area.

2. Southern Border

On the Southern border, CBP conducts outbound pulse and surge operations as part of its law enforcement mission.¹³ These operations are ongoing and provide some outbound departure information on travelers departing the United States and entering Mexico. In 2016, CBP employed the following experiments and analysis to account for limited information available on foreign nationals departing into Mexico through the Southwest border:

Land Exit Experiment

In early FY 2016, CBP deployed an experiment at the Otay Mesa border crossing in San Diego, California. The focus of the experiment was to collect biographic data from all departing travelers and biometric information from departing foreign national travelers in the pedestrian environment. While CBP did not retain biometric exit records as part of the test, CBP was able to biometrically verify the biographic departure records of departing foreign nationals during the course of the test. The land exit experiment allowed CBP to test the capability of biometrics other than fingerprints (face recognition and iris recognition) in an outdoor environment to help determine the feasibility of using specific biometric technologies in additional tests and the ultimate biometric exit solution. CBP is in the process of completing an analysis.

Southern Border “Subsequent Arrival” Analysis

During FY 2015, CBP developed an analysis in order to attempt to provide information on the likelihood of overstay from those who enter via the Southwest land border. Given the progress in the air, sea, and the Northern land border, the Southwest border remains the sole environment in which CBP does not currently have a reliable biographic exit system.

The analysis was developed to identify how frequently Southwest border inbound travelers return to cross the Southwest border again (thus confirming their departure at some point in the past) after the original crossing. This was premised on existing assumptions that many travelers who cross the Southwest border do so on a routine basis, and, thus, are unlikely to be overstays. CBP attempted to quantify how often this was the case. CBP's initial analysis identified 94.2 percent of those who entered via the Southwest border reentered the United States within 180 days. The true departure rate is almost certainly higher, as there were likely some that left the United States and never reentered. CBP will continue to refine and provide additional information in subsequent reports as further efforts provide added clarity within the entry and exit mission. Prior to the release of the next annual overstay report, CBP plans to publish an interim report on subsequent arrival data using partial-year FY 2017 data. CBP will continue to refine its data methodology in order to ensure the integrity of the statistics provided.

¹³ “Pulse and Surge” operations are strategies whereby CBP officers monitor outbound traffic on the U.S. southern border. See Testimony of Commissioner Alan Bersin, Commissioner of U.S. Customs and Border Protection, before the Senate Caucus on International Narcotics Control, Mar. 9, 2011. Accessible at <http://www.dhs.gov/news/2011/03/09/testimony-commissioner-alan-bersein-us-customs-and-border-protection-senate-caucus>. Although the purpose of “pulse and surge” is to counter the trafficking of drugs, currency, and firearms into Mexico, CBP can use data collected during these operations to create departure records for foreign nationals.

C. Overstay Definition

An overstay is a nonimmigrant who was lawfully admitted to the United States for an authorized period but stayed in the United States beyond his or her lawful admission period.

Nonimmigrants admitted for “duration of status” who fail to maintain their status also may be considered overstays. “Duration of status” is a term used for foreign nationals who are admitted for the duration of a specific program or activity, which may be variable, instead of for a set timeframe.¹⁴ The lawful admission period ends when the foreign national has accomplished the purpose or is no longer engaged in authorized activities pertaining to that purpose. An example is a student program that runs for four years. When the program is completed, the student must leave or go on to pursue another program of study.

DHS classifies individuals as overstays by using the ADIS system to match departure and status change records to arrival records collected during the admission process. DHS identifies an individual as having overstayed if his or her departure record shows they departed the United States after their lawful admission period expired¹⁵ (i.e., Out-of-Country Overstays). While these individuals are considered overstays, there is evidence indicating they are no longer physically present in the United States. DHS also identifies individuals as possible overstays if there are no records of a departure or change in status prior to the end of their authorized admission period (i.e., Suspected In-Country Overstays)¹⁶.

In this report, DHS presents ADIS-generated overstay rates by country of citizenship for nonimmigrant visitors who were admitted to the United States through an air or sea POE, regardless of overstay type¹⁷. These classes of admission made up 96.02 percent of the total number of visits by nonimmigrants who arrived by air or sea and who were expected to depart in FY 2016. While significant progress has been made, challenges remain with the integration of systems used in the travel continuum for reporting on classes of admission associated with land entry.

¹⁴ For example, “duration of status” for F nonimmigrants is defined as “the time during which an F-1 student is pursuing a full course of study at an [approved] educational institution . . . or engaging in authorized practical training.” 8 C.F.R. 214.2(f)(5)(i)

¹⁵ In these cases, DHS sanctions the individual who overstayed the authorized period of stay in the U.S. according to existing immigration law, which is based on a sliding scale of penalties depending on the length of time unlawfully present in the United States. See, e.g., 8 U.S.C. § 1202(g) (nonimmigrant visa is voided at conclusion of authorized period of stay, if an individual remains in the United States beyond the authorized period); 8 U.S.C. § 1187(a)(7) (referring to VWP, “if the alien previously was admitted without a visa under this section, the alien must not have failed to comply with the conditions of any previous admission as such a nonimmigrant”); and 8 U.S.C. § 1182(a)(9)(B)(i)(I) and (II) (alien inadmissible for 3 years if unlawfully present for more than 180 days but less than a year; alien inadmissible for 10 years if unlawfully present for a year or more, pursuant to various provisions of the Immigration and Nationality Act).

¹⁶ Pending immigration benefit applications and approved extensions of stay, change of nonimmigrant status, or adjustment of status to lawful permanent residence may extend or modify the authorized period of stay. For example, upon entering the United States a person may be granted a six-month period of admission, but thereafter lawfully change immigration status prior to the expiration of that period, and in turn be authorized to stay beyond the initial six months. These options are not available to all categories of aliens. See 8 U.S.C. 1258, 8 C.F.R. 248.2. For example, those who enter under VWP are generally not eligible to change or extend their nonimmigrant status. 8 C.F.R. § 245.1(b)(8); 8 C.F.R. § 248.2(a)(6).

¹⁷ The sea overstay rates are only reflective of the population that initially entered the United States through a sea POE but is not reflective of all traveler arrivals where the vessel both departs from and subsequently arrives at the same location (commonly referred to as “closed loop” cruises.) For example, if a foreign national already within the United States departs from the Port Canaveral, Florida Seaport for a seven-day cruise in the Caribbean and subsequently re-enters at Port Canaveral, then that arrival would not be taken into account for the purposes of this report.

This report also includes additional nonimmigrant admission classes not included in the FY 2015 report. Enhancements to the DHS systems, which were completed by CBP, U.S. Immigration and Customs Enforcement (ICE), and USCIS, enable DHS to calculate overstays associated with admission classes that are more frequently subject to change, such as student and exchange visitors admitted under duration of status. These additional admission classes include temporary workers, intracompany transferees, treaty traders/investors, and attendants/servants. The following nonimmigrants are not included in the report due to unspecified authorized periods of stay and legal protections: diplomats and other representatives, crewmembers, aliens in transit, and Section 1367 special protected classes (Appendix B).

1. Student (F/M) and Exchange Visitor (J) Classes of Admission

The F class of admission is for academic students, the M class of admission is for technical/vocational students, and the J class of admission is for exchange visitors. These categories of admission also include dependents. There are numerous rules governing authorized activities and information tracking F, M, J visitors (including their dependents) is recorded in ICE's Student and Exchange Visitor Information System (SEVIS).

2. ADIS's use of SEVIS information in Calculating Student and Exchange Visitor Overstays

SEVIS provides ADIS with the last date of valid status, which is the date the F, M, or J nonimmigrant's program of study is due to end. This date is calculated based on the relevant regulations and the authorized activities reported for each nonimmigrant, as reported by the Designated School Official assigned at each SEVP-certified school or by the Responsible Officer at each U.S. Department of State (DOS) designated J program sponsor. Although SEVIS tracks the immigration status of F, M, and J visa holders, the J visa program is administered by DOS, not DHS. SEVIS transmits the F, M, or J status expiration date to CBP through an automated process. CBP uses this data to cross-reference the information with the nonimmigrant visitor's travel records and any available updates to their immigration status. For Suspected In-Country Overstay violators, an overstay determination is made when the nonimmigrant's status as an F, M, or J is no longer active and no evidence of a change of status or departure is found.

D. Overstay Identification and Action

CBP maintains arrival and departure information for all foreign nationals based on border crossings and carrier data. This information is used to generate daily overstay lists by the ADIS system. These system-generated overstay lists are sent for checks against the CBP Automated Targeting System (ATS) and the USCIS's Computer Linked Application Information Management System 3 (CLAIMS3) database, reducing the overall list size by identifying persons who have departed the United States or adjusted their status into another nonimmigrant or immigrant category. The ATS then applies screening rules, as defined by ICE, to prioritize system-identified overstays. This creates a prioritized overstay list, which is sent to ICE.

The Homeland Security Investigations (HSI) Counterterrorism and Criminal Exploitation Unit (CTCEU) at ICE oversees the national program dedicated to the enforcement of nonimmigrant

visa violations. Each year, CTCEU analyzes records of hundreds of thousands of potential status violators from various investigative databases and DHS entry/exit registration systems. To better manage investigative resources, CTCEU relies on a prioritization framework for these leads established in consultation with interagency partners within the national intelligence and federal law enforcement communities. Those identified as posing a potential national security threat to the United States are prioritized and referred to ICE HSI field offices for investigation. Leads that do not meet CTCEU's criteria are sent to the ICE Enforcement and Removal Operations (ERO) National Criminal Analysis and Targeting Center for further vetting and forwarding to ICE ERO Field Offices for enforcement action if they represent a public safety threat.

ICE HSI Special Agents and analysts continuously monitor threat reports and proactively address emergent issues. This practice has contributed to ICE's counterterrorism mission by initiating or supporting high-priority national security initiatives based upon specific intelligence. The goal is to identify, locate, prosecute where applicable, and remove those overstay poses posing real or potential national security threats to the United States. This activity is accomplished through developing criteria in consultation with interagency partners within the national intelligence and federal law enforcement communities. ICE focuses its investigations on those subjects who are considered to pose a higher risk to national security. Additionally, CTCEU utilizes the National Counterterrorism Center in support of its Overstay Program to screen overstay poses by identifying potential matches to derogatory intelligence community holdings.

IV. Overstay Rates

The following tables represent country-by-country analysis of data from FY 2016. For this report, the “in-scope” population includes the following categories of nonimmigrant admissions: temporary workers and families (temporary workers and trainees, intracompany transferees, treaty traders and investors, representatives of foreign information media), students, exchange visitors, temporary visitors for pleasure, temporary visitors for business, and other nonimmigrant classes of admission.

In the Tables 1–6 the term “Expected Departures” represents the travelers from each country who were admitted to the United States as a nonimmigrant and whose expected departure date occurred within FY 2016. The “Total Number of Overstays” for each country equals the summation of both the Out-of-Country and Suspected In-Country Overstays for a specific country. The “Overstay Rate” is the percentage of travelers from each country who overstayed their period of admission to the United States, regardless of type.¹⁸ This rate is the percentage of the Total Number of Overstays compared with the current fiscal year’s Expected Departures.

In FY 2016, DHS identified 50,437,278 in-scope nonimmigrant admissions to the United States via air or sea. Analysis of the FY 2016 nonimmigrant travel data identified a Suspected In-Country Overstay rate of 1.25 percent (628,799), and a total overstay rate of 1.47 percent (739,478) out of the overall expected departures of in-scope travelers in FY 2016.

Temporary Visitors for Business and Pleasure (Tables 2, 3, and 6):

Tables 2 and 3 present the overstay rates for temporary visitors for business and pleasure. The overstay rates for temporary visitors for business and pleasure traveling as a participant in the VWP are identified in (Table 2). Similarly, Table 3 identifies the overstay rates for temporary visitors for business and pleasure admitted to the United States under B1 or B2 classes of admission. The B1 and B2 overstay rates for Canada and Mexico (Table 6) are separate due to the high percentage of land travelers who are admitted to the United States relative to the other countries. It is important to note that the total number of overstays, as identified in this report, does not equal the total number of overstays who currently remain in the United States. That number is lower because foreign nationals identified as possible overstays can subsequently depart the United States, or adjust their lawful status. For purposes of this report, these are still considered overstays.

Visa Waiver Program Air and Sea Overstay Rate Summary

In FY 2016 for VWP countries, DHS calculated 21,616,034 expected departures. The FY 2016 VWP total overstay rate is 0.68 percent of the VWP expected departures, and the Suspected In-Country Overstay rate is 0.60 percent of the VWP expected departures.

¹⁸ Rates are shown for countries as well as passport-issuing authorities and places of origin recognized by the United States. With respect to all references to “country” or “countries” in this document, Section 4(b)(1) of the Taiwan Relations Act of 1979 (Pub. L. No. 96-8) provides that “[w]henver the laws of the United States refer or relate to foreign countries, nations, states, governments, or similar entities, such terms shall include and such laws shall apply with respect to Taiwan.” 22 U.S.C. § 3303(b)(1). Accordingly, references to “country” or “countries” in the VWP authorizing legislation, Section 217 of the Immigration and Nationality Act (8 U.S.C. § 1187), are read to include Taiwan. Taiwan entered the VWP on October 2, 2012.

Non-VWP Countries Business or Pleasure Visitors Air and Sea Overstay rate Summary (excluding Canada and Mexico)

For the FY 2016 non-VWP countries, DHS calculated 13,848,480 expected departures. The FY 2016 non-VWP total overstay rate is 2.07 percent of the non-VWP expected departures, and the Suspected In-Country Overstay rate is 1.90 percent of the non-VWP expected departures. DHS is in the process of evaluating whether and to what extent to use the data presented in this report to make decisions regarding the continued designation of countries in the VWP.

Student and Exchange Visitors

For the purposes of this Report, the term “Expected Departures” located in Table 4, refers to a date calculated in SEVIS based on the authorized program or employment status of an F or M student or J exchange visitor.

In FY 2016, DHS calculated a total of 1,457,556¹⁹ students and exchange visitors who were expected to change status or depart the United States. The 1,457,556 is comprised of 975,046 “F”, 13,963 “M”, and 468,547 “J” visa categories of admission. The F, M, and J Suspected In-Country Overstay rate is 2.81 percent of the total number of students and exchange visitors who were expected to change status or depart the United States. The Suspected In-Country Overstay rate is 2.99 percent for the F visa category, 2.94 percent for the M visa category and 2.42 percent for J visa category. The total overstay rate (i.e. both Suspected In-Country and Out-of-Country Overstays) for students and exchange visitors in FY 2016 is 5.48 percent of the total number of students and exchange visitors who were expected to have adjusted status or departed from the United States in FY 2016. The total overstay rate is 6.19 percent for the F visa category, 11.60 percent for the M visa category, and 3.80 percent for the J visa category.

¹⁹ This figure does not include the F/M/J classes of admission for those with a Mexican or Canadian Country of citizenship those figures are included in table 6. With the inclusion of Canada and Mexico the F/M/J total is 1,549,499 (1,039,416 “F”, 15,253 “M”, and 494,830 “J”)

A. Overstay Rate Summary

The table below provides a high-level summary of the country-by-country data identified in Tables 2 through 6.

Table 1 FY 2016 Summary Overstay rates for Nonimmigrant Visitors admitted to the United States via air and sea POEs						
Admission Type	Expected Departures	Out-of-Country Overstays	Suspected In-Country Overstays	Total Overstays	Total Overstay Rate	Suspected In-Country Overstay Rate
<i>VWP Countries Business or Pleasure Visitors^{20,21} (Table 2)</i>	21,616,034	18,476	128,806	147,282	0.68%	0.60%
<i>Non-VWP Countries Business or Pleasure Visitors (excluding Canada and Mexico) (Table 3)</i>	13,848,480	23,637	263,470	287,107	2.07%	1.90%
<i>Student and Exchange Visitors (excluding Canada and Mexico) (Table 4)</i>	1,457,556	38,869	40,949	79,818	5.48%	2.81%
<i>All Other In-Scope Nonimmigrant²² Visitors (excluding Canada and Mexico) (Table 5)</i>	1,427,188	13,504	29,498	43,002	3.01%	2.07%
<i>Canada and Mexico Nonimmigrant Visitors (Table 6)</i>	12,088,020	16,193	166,076	182,269	1.51%	1.37%
TOTAL	50,437,278	110,679	628,799	739,478	1.47%	1.25%

²⁰ Upon admission into the United States, visitors classified under either a WT (waiver-tourist) or a WB (waiver-business) status.

²¹ Citizens or nationals of VWP countries may also obtain and travel to the United States on a B-1/B-2 visa and seek admission under the B-1 or B-2 nonimmigrant classification.

²² See Appendix A for a complete list of "In-Scope nonimmigrant classes of admission"

B. VWP Nonimmigrant Business or Pleasure Overstay Rates

Country of Citizenship	Expected Departures	Out-of-Country Overstays	Suspected In-Country Overstays	Total Overstays	Total Overstay Rate	Suspected In-Country Overstay Rate
<i>Andorra</i>	1,308	-	9	9	0.69%	0.69%
<i>Australia</i> ²³	1,362,199	980	6,583	7,563	0.56%	0.48%
<i>Austria</i>	211,224	116	2,784	2,900	1.37%	1.32%
<i>Belgium</i>	288,117	178	1,369	1,547	0.54%	0.48%
<i>Brunei</i>	1,125	1	10	11	0.98%	0.89%
<i>Chile</i>	363,570	813	5,416	6,229	1.71%	1.49%
<i>Czech Republic</i>	103,158	214	927	1,141	1.11%	0.90%
<i>Denmark</i> ²⁴	329,981	158	1,505	1,663	0.50%	0.46%
<i>Estonia</i>	23,158	35	160	195	0.84%	0.69%
<i>Finland</i>	156,057	112	604	716	0.46%	0.39%
<i>France</i> ²⁵	1,751,536	1,629	10,358	11,987	0.68%	0.59%
<i>Germany</i>	2,061,112	1,416	18,780	20,196	0.98%	0.91%
<i>Greece</i>	77,562	421	1,280	1,701	2.19%	1.65%
<i>Hungary</i>	82,533	431	1,841	2,272	2.75%	2.23%
<i>Iceland</i>	54,806	28	154	182	0.33%	0.28%
<i>Ireland</i>	483,613	392	2,177	2,569	0.53%	0.45%
<i>Italy</i>	1,207,242	1,480	14,896	16,376	1.36%	1.23%
<i>Japan</i>	3,007,800	441	4,401	4,842	0.16%	0.15%
<i>Korea, South</i>	1,266,839	1,368	4,507	5,875	0.46%	0.36%
<i>Latvia</i>	20,344	107	249	356	1.75%	1.22%
<i>Liechtenstein</i>	2,082	2	15	17	0.82%	0.72%
<i>Lithuania</i>	30,846	129	484	613	1.99%	1.57%
<i>Luxembourg</i>	14,251	11	100	111	0.78%	0.70%
<i>Malta</i>	6,047	7	54	61	1.01%	0.89%
<i>Monaco</i>	1,097	2	4	6	0.55%	0.36%
<i>Netherlands</i> ²⁶	721,977	511	4,081	4,592	0.64%	0.57%
<i>New Zealand</i> ²⁷	308,703	273	1,526	1,799	0.58%	0.49%
<i>Norway</i>	281,559	158	992	1,150	0.41%	0.35%
<i>Portugal</i>	164,662	621	3,365	3,986	2.42%	2.04%
<i>San Marino</i>	697	2	12	14	2.01%	1.72%
<i>Singapore</i>	127,149	146	471	617	0.49%	0.37%

²³ Australia includes Australia, Norfolk Island, Christmas Island, and Cocos (Keeling) Island.

²⁴ Denmark includes Denmark, Faroe Islands, and Greenland.

²⁵ France includes France, French Guiana, French Polynesia, French Southern and Antarctic Lands, Guadeloupe, Martinique, Mayotte, New Caledonia, Reunion, Saint Barthelemy, Saint Pierre and Miquelon, and Wallis and Futuna.

²⁶ Netherlands includes the Netherlands, Aruba, Bonaire, Curacao, Saba, Sint Eustatius, and Sint Maarten.

²⁷ New Zealand includes New Zealand, Cook Islands, Tokelau, and Niue.

Table 2 FY 2016 Overstay rates for nonimmigrant visitors admitted to the United States for business or pleasure (WB/WT/B-1/B-2) via air and sea POEs for VWP Countries						
Country of Citizenship	Expected Departures	Out-of-Country Overstays	Suspected In-Country Overstays	Total Overstays	Total Overstay Rate	Suspected In-Country Overstay Rate
<i>Slovakia</i>	46,449	156	703	859	1.85%	1.51%
<i>Slovenia</i>	24,158	27	223	250	1.03%	0.92%
<i>Spain</i>	940,218	1,969	11,716	13,685	1.46%	1.25%
<i>Sweden</i>	560,320	370	2,601	2,971	0.53%	0.46%
<i>Switzerland</i>	434,189	289	2,257	2,546	0.59%	0.52%
<i>Taiwan</i>	388,713	681	1,522	2,203	0.57%	0.39%
<i>United Kingdom</i> ²⁸	4,709,633	2,802	20,670	23,472	0.50%	0.44%
TOTAL	21,616,034	18,476	128,806	147,282	0.68%	0.60%

²⁸ United Kingdom includes the United Kingdom, Anguilla, Bermuda, British Virgin Islands, Cayman Islands, Falkland Islands, Gibraltar, Guernsey, Isle of Man, Jersey, Montserrat, Pitcairn Islands, Saint Helena, and Turks and Caicos Islands.

C. Non-VWP Country B1/B2 Overstay Rates

Country Of Citizenship	Expected Departures	Out-of-Country Overstays	Suspected In-Country Overstays	Total Overstays	Total Overstay Rate	Suspected In-Country Overstay Rate
<i>Afghanistan</i>	2,123	8	291	299	14.08%	13.71%
<i>Albania</i>	7,881	32	349	381	4.83%	4.43%
<i>Algeria</i>	9,710	39	356	395	4.07%	3.67%
<i>Angola</i>	8,307	29	286	315	3.79%	3.44%
<i>Antigua and Barbuda</i>	15,444	39	205	244	1.58%	1.33%
<i>Argentina</i>	840,739	318	6,752	7,070	0.84%	0.80%
<i>Armenia</i>	6,659	15	282	297	4.46%	4.24%
<i>Azerbaijan</i>	5,579	18	198	216	3.87%	3.55%
<i>Bahamas, The</i>	233,902	344	3,876	4,220	1.80%	1.66%
<i>Bahrain</i>	7,480	13	101	114	1.52%	1.35%
<i>Bangladesh</i>	27,865	73	1,009	1,082	3.88%	3.62%
<i>Barbados</i>	59,316	74	1,621	1,695	2.86%	2.73%
<i>Belarus</i>	14,659	29	544	573	3.91%	3.71%
<i>Belize</i>	27,168	53	576	629	2.32%	2.12%
<i>Benin</i>	2,017	9	104	113	5.60%	5.16%
<i>Bhutan</i>	394	3	99	102	25.89%	25.13%
<i>Bolivia</i>	63,071	110	1,129	1,239	1.96%	1.79%
<i>Bosnia and Herzegovina</i>	6,884	30	157	187	2.72%	2.28%
<i>Botswana</i>	2,016	5	24	29	1.44%	1.19%
<i>Brazil</i>	2,074,363	2,526	36,929	39,455	1.90%	1.78%
<i>Bulgaria</i>	27,469	87	401	488	1.78%	1.46%
<i>Burkina Faso</i>	4,494	27	1,146	1,173	26.10%	25.50%
<i>Burma</i>	4,877	13	232	245	5.02%	4.76%
<i>Burundi</i>	1,046	8	146	154	14.72%	13.96%
<i>Cabo Verde</i>	4,166	30	719	749	17.98%	17.26%
<i>Cambodia</i>	2,792	4	50	54	1.93%	1.79%
<i>Cameroon</i>	8,665	143	832	975	11.25%	9.60%
<i>Central African Republic</i>	197	-	23	23	11.68%	11.68%
<i>Chad</i>	643	2	106	108	16.80%	16.49%
<i>China</i> ²⁹	2,058,311	2,493	17,108	19,601	0.95%	0.83%
<i>Colombia</i>	863,417	1,062	18,404	19,466	2.26%	2.13%
<i>Comoros</i>	75	-	3	3	4.00%	4.00%
<i>Congo (Brazzaville)</i> ³⁰	1,221	4	101	105	8.60%	8.27%
<i>Congo (Kinshasa)</i> ³¹	5,412	35	474	509	9.41%	8.76%
<i>Costa Rica</i>	260,245	231	2,530	2,761	1.06%	0.97%
<i>Croatia</i>	22,075	31	197	228	1.03%	0.89%

²⁹ China includes the People's Republic of China, Hong Kong, and Macau.

³⁰ Congo (Brazzaville) refers to the Republic of the Congo.

³¹ Congo (Kinshasa) refers to the Democratic Republic of the Congo.

Table 3 FY 2016 Overstay rates for nonimmigrants admitted to the United States for business or pleasure via air and sea POEs for non-VWP Countries (excluding Canada, Mexico, and Students)						
Country Of Citizenship	Expected Departures	Out-of-Country Overstays	Suspected In-Country Overstays	Total Overstays	Total Overstay Rate	Suspected In-Country Overstay Rate
<i>Cuba</i>	48,719	194	712	906	1.86%	1.46%
<i>Cyprus</i>	8,844	11	89	100	1.13%	1.01%
<i>Côte d'Ivoire</i>	5,795	40	433	473	8.16%	7.47%
<i>Djibouti</i>	382	9	95	104	27.23%	24.87%
<i>Dominica</i>	7,248	23	268	291	4.02%	3.70%
<i>Dominican Republic</i>	341,628	442	9,211	9,653	2.83%	2.70%
<i>Ecuador</i>	392,521	387	7,356	7,743	1.97%	1.87%
<i>Egypt</i>	80,716	201	1,715	1,916	2.37%	2.13%
<i>El Salvador</i>	183,255	308	4,771	5,079	2.77%	2.60%
<i>Equatorial Guinea</i>	937	7	43	50	5.34%	4.59%
<i>Eritrea</i>	2,390	133	473	606	25.36%	19.79%
<i>Ethiopia</i>	14,645	96	662	758	5.18%	4.52%
<i>Fiji</i>	8,159	34	262	296	3.63%	3.21%
<i>Gabon</i>	1,961	22	83	105	5.35%	4.23%
<i>Gambia, The</i>	1,614	17	181	198	12.27%	11.21%
<i>Georgia</i>	7,456	20	1,036	1,056	14.16%	13.90%
<i>Ghana</i>	21,602	104	963	1,067	4.94%	4.46%
<i>Grenada</i>	10,877	39	301	340	3.13%	2.77%
<i>Guatemala</i>	247,084	362	5,442	5,804	2.35%	2.20%
<i>Guinea</i>	2,332	22	199	221	9.48%	8.53%
<i>Guinea-Bissau</i>	144	1	20	21	14.58%	13.89%
<i>Guyana</i>	54,471	113	1,811	1,924	3.53%	3.33%
<i>Haiti</i>	129,617	669	5,000	5,669	4.37%	3.86%
<i>Holy See</i>	17	-	-	-	0.00%	0.00%
<i>Honduras</i>	182,601	272	5,085	5,357	2.93%	2.79%
<i>India</i>	1,004,245	2,040	15,723	17,763	1.77%	1.57%
<i>Indonesia</i>	80,936	115	1,196	1,311	1.62%	1.48%
<i>Iran</i>	23,749	121	588	709	2.99%	2.48%
<i>Iraq</i>	9,140	54	986	1,040	11.38%	10.79%
<i>Israel</i>	374,404	451	3,584	4,035	1.08%	0.96%
<i>Jamaica</i>	281,797	444	9,177	9,621	3.41%	3.26%
<i>Jordan</i>	37,792	272	2,256	2,528	6.69%	5.97%
<i>Kazakhstan</i>	18,157	40	494	534	2.94%	2.72%
<i>Kenya</i>	20,178	114	723	837	4.15%	3.58%
<i>Kiribati</i>	100	-	2	2	2.00%	2.00%
<i>Korea, North</i> ³²	80	-	-	-	0.00%	0.00%
<i>Kuwait</i>	49,210	486	828	1,314	2.67%	1.68%
<i>Kyrgyzstan</i>	2,292	13	128	141	6.15%	5.59%
<i>Laos</i>	1,247	14	146	160	12.83%	11.71%
<i>Lebanon</i>	39,454	100	928	1,028	2.61%	2.35%
<i>Lesotho</i>	317	1	6	7	2.21%	1.89%

³² North Korea refers to the Democratic People's Republic of Korea.

Table 3 FY 2016 Overstay rates for nonimmigrants admitted to the United States for business or pleasure via air and sea POEs for non-VWP Countries (excluding Canada, Mexico, and Students)						
Country Of Citizenship	Expected Departures	Out-of-Country Overstays	Suspected In-Country Overstays	Total Overstays	Total Overstay Rate	Suspected In-Country Overstay Rate
<i>Liberia</i>	3,894	68	677	745	19.13%	17.39%
<i>Libya</i>	1,074	7	64	71	6.61%	5.96%
<i>Macedonia</i>	6,349	22	166	188	2.96%	2.62%
<i>Madagascar</i>	930	3	13	16	1.72%	1.40%
<i>Malawi</i>	2,005	6	99	105	5.24%	4.94%
<i>Malaysia</i>	77,827	93	1,284	1,377	1.77%	1.65%
<i>Maldives</i>	196	-	3	3	1.53%	1.53%
<i>Mali</i>	2,936	15	164	179	6.10%	5.59%
<i>Marshall Islands</i>	60	-	8	8	13.33%	13.33%
<i>Mauritania</i>	1,212	16	174	190	15.68%	14.36%
<i>Mauritius</i>	3,286	3	30	33	1.00%	0.91%
<i>Micronesia, Federated States of</i>	40	1	9	10	25.00%	22.50%
<i>Moldova</i>	8,557	31	399	430	5.03%	4.66%
<i>Mongolia</i>	10,215	48	746	794	7.77%	7.30%
<i>Montenegro</i>	4,361	10	233	243	5.57%	5.34%
<i>Morocco</i> ³³	27,294	100	557	657	2.41%	2.04%
<i>Mozambique</i>	1,827	8	39	47	2.57%	2.14%
<i>Namibia</i>	1,589	3	22	25	1.57%	1.39%
<i>Nauru</i>	25	1	-	1	4.00%	0.00%
<i>Nepal</i>	18,775	157	789	946	5.04%	4.20%
<i>Nicaragua</i>	66,206	105	1,339	1,444	2.18%	2.02%
<i>Niger</i>	902	5	42	47	5.21%	4.66%
<i>Nigeria</i>	189,883	582	11,461	12,043	6.34%	6.04%
<i>Oman</i>	4,897	10	46	56	1.14%	0.94%
<i>Pakistan</i>	87,871	226	2,415	2,641	3.01%	2.75%
<i>Palau</i>	57	-	4	4	7.02%	7.02%
<i>Panama</i>	158,076	143	805	948	0.60%	0.51%
<i>Papua New Guinea</i>	1,266	6	5	11	0.87%	0.40%
<i>Paraguay</i>	27,836	28	409	437	1.57%	1.47%
<i>Peru</i>	296,684	454	5,310	5,764	1.94%	1.79%
<i>Philippines</i>	250,753	562	4,438	5,000	1.99%	1.77%
<i>Poland</i>	176,495	334	2,787	3,121	1.77%	1.58%
<i>Qatar</i>	14,382	81	196	277	1.93%	1.36%
<i>Romania</i>	66,451	186	1,052	1,238	1.86%	1.58%
<i>Russia</i>	256,280	334	3,344	3,678	1.44%	1.31%
<i>Rwanda</i>	2,646	10	110	120	4.54%	4.16%
<i>Saint Kitts and Nevis</i>	12,115	18	262	280	2.31%	2.16%
<i>Saint Lucia</i>	15,616	31	320	351	2.25%	2.05%
<i>Saint Vincent and the Grenadines</i>	9,608	20	342	362	3.77%	3.56%

³³ Morocco includes Morocco and Western Sahara.

Table 3 FY 2016 Overstay rates for nonimmigrants admitted to the United States for business or pleasure via air and sea POEs for non-VWP Countries (excluding Canada, Mexico, and Students)						
Country Of Citizenship	Expected Departures	Out-of-Country Overstays	Suspected In-Country Overstays	Total Overstays	Total Overstay Rate	Suspected In-Country Overstay Rate
<i>Samoa</i>	2,006	18	103	121	6.03%	5.14%
<i>Sao Tome and Principe</i>	45	-	1	1	2.22%	2.22%
<i>Saudi Arabia</i>	135,108	990	1,429	2,419	1.79%	1.06%
<i>Senegal</i>	7,564	31	272	303	4.01%	3.60%
<i>Serbia</i>	23,175	73	507	580	2.50%	2.19%
<i>Seychelles</i>	352	1	2	3	0.85%	0.57%
<i>Sierra Leone</i>	2,426	27	157	184	7.59%	6.47%
<i>Solomon Islands</i>	174	-	-	-	0.00%	0.00%
<i>Somalia</i>	137	-	8	8	5.84%	5.84%
<i>South Africa</i>	121,072	178	837	1,015	0.84%	0.69%
<i>South Sudan</i>	257	1	6	7	2.72%	2.34%
<i>Sri Lanka</i>	18,333	43	315	358	1.95%	1.72%
<i>Sudan</i>	3,885	26	341	367	9.45%	8.78%
<i>Suriname</i>	14,485	11	118	129	0.89%	0.82%
<i>Swaziland</i>	651	-	8	8	1.23%	1.23%
<i>Syria</i>	11,821	64	726	790	6.68%	6.14%
<i>Tajikistan</i>	1,308	19	119	138	10.55%	9.10%
<i>Tanzania</i>	6,496	18	181	199	3.06%	2.79%
<i>Thailand</i>	84,785	168	1,954	2,122	2.50%	2.31%
<i>Timor-Leste</i>	51	-	2	2	3.92%	3.92%
<i>Togo</i>	1,912	20	197	217	11.35%	10.30%
<i>Tonga</i>	3,632	13	295	308	8.48%	8.12%
<i>Trinidad and Tobago</i>	181,218	129	868	997	0.55%	0.48%
<i>Tunisia</i>	8,900	15	198	213	2.39%	2.23%
<i>Turkey</i>	176,695	312	2,531	2,843	1.61%	1.43%
<i>Turkmenistan</i>	951	2	44	46	4.84%	4.63%
<i>Tuvalu</i>	52	1	-	1	1.92%	0.00%
<i>Uganda</i>	7,362	34	379	413	5.61%	5.15%
<i>Ukraine</i>	83,401	243	2,707	2,950	3.54%	3.25%
<i>United Arab Emirates</i>	30,577	275	452	727	2.38%	1.48%
<i>Uruguay</i>	77,164	76	1,353	1,429	1.85%	1.75%
<i>Uzbekistan</i>	9,592	39	803	842	8.78%	8.37%
<i>Vanuatu</i>	126	1	1	2	1.59%	0.79%
<i>Venezuela</i>	551,048	915	22,906	23,821	4.32%	4.16%
<i>Vietnam</i>	79,097	393	2,689	3,082	3.90%	3.40%
<i>Yemen</i>	2,887	20	194	214	7.41%	6.72%
<i>Zambia</i>	3,662	6	120	126	3.44%	3.28%
<i>Zimbabwe</i>	6,802	20	148	168	2.47%	2.18%
TOTAL	13,848,480	23,637	263,470	287,107	2.07%	1.90%

D. Nonimmigrant Student and Exchange Visitors Overstay Rates

Table 4 FY 2016 Overstay rates for nonimmigrant students and exchange visitors (F, M, J) admitted to the United States via air and sea POEs (excluding Canada and Mexico)						
Country of Citizenship	Expected Departures	Out-of-Country Overstays	Suspected In-Country Overstays	Total Overstays	Total Overstay Rate	Suspected In-Country Overstay Rate
<i>Afghanistan</i>	556	14	88	102	18.35%	15.83%
<i>Albania</i>	779	11	65	76	9.76%	8.34%
<i>Algeria</i>	563	35	20	55	9.77%	3.55%
<i>Andorra</i>	40	-	-	-	0.00%	0.00%
<i>Angola</i>	1,539	118	111	229	14.88%	7.21%
<i>Antigua and Barbuda</i>	288	8	12	20	6.94%	4.17%
<i>Argentina</i>	8,599	128	100	228	2.65%	1.16%
<i>Armenia</i>	463	11	20	31	6.70%	4.32%
<i>Australia</i>	13,083	341	92	433	3.31%	0.70%
<i>Austria</i>	4,987	78	36	114	2.29%	0.72%
<i>Azerbaijan</i>	845	27	65	92	10.89%	7.69%
<i>Bahamas, The</i>	4,482	188	113	301	6.72%	2.52%
<i>Bahrain</i>	890	26	17	43	4.83%	1.91%
<i>Bangladesh</i>	3,273	127	361	488	14.91%	11.03%
<i>Barbados</i>	538	14	10	24	4.46%	1.86%
<i>Belarus</i>	1,074	22	70	92	8.57%	6.52%
<i>Belgium</i>	4,666	63	38	101	2.17%	0.81%
<i>Belize</i>	446	12	14	26	5.83%	3.14%
<i>Benin</i>	400	11	125	136	34.00%	31.25%
<i>Bhutan</i>	165	3	37	40	24.24%	22.42%
<i>Bolivia</i>	1,668	43	63	106	6.36%	3.78%
<i>Bosnia and Herzegovina</i>	774	15	58	73	9.43%	7.49%
<i>Botswana</i>	268	9	10	19	7.09%	3.73%
<i>Brazil</i>	49,029	1,371	1,510	2,881	5.88%	3.08%
<i>Brunei</i>	108	2	1	3	2.78%	0.93%
<i>Bulgaria</i>	7,387	111	287	398	5.39%	3.89%
<i>Burkina Faso</i>	699	12	327	339	48.50%	46.78%
<i>Burma</i>	1,036	33	89	122	11.78%	8.59%
<i>Burundi</i>	167	8	35	43	25.75%	20.96%
<i>Cabo Verde</i>	125	4	23	27	21.60%	18.40%
<i>Cambodia</i>	454	10	28	38	8.37%	6.17%
<i>Cameroon</i>	889	25	255	280	31.50%	28.68%
<i>Central African Republic</i>	27	3	7	10	37.04%	25.93%
<i>Chad</i>	68	2	25	27	39.71%	36.77%
<i>Chile</i>	7,803	191	150	341	4.37%	1.92%
<i>China</i>	360,334	10,530	7,545	18,075	5.02%	2.09%
<i>Colombia</i>	20,830	560	647	1,207	5.80%	3.11%
<i>Comoros</i>	10	-	-	-	0.00%	0.00%

Table 4 FY 2016 Overstay rates for nonimmigrant students and exchange visitors (F, M, J) admitted to the United States via air and sea POEs (excluding Canada and Mexico)						
Country of Citizenship	Expected Departures	Out-of-Country Overstays	Suspected In-Country Overstays	Total Overstays	Total Overstay Rate	Suspected In-Country Overstay Rate
<i>Congo (Brazzaville)</i>	201	7	48	55	27.36%	23.88%
<i>Congo (Kinshasa)</i>	517	16	189	205	39.65%	36.56%
<i>Costa Rica</i>	2,524	62	63	125	4.95%	2.50%
<i>Croatia</i>	1,518	45	34	79	5.20%	2.24%
<i>Cuba</i>	100	4	2	6	6.00%	2.00%
<i>Cyprus</i>	653	11	10	21	3.22%	1.53%
<i>Czech Republic</i>	4,884	80	67	147	3.01%	1.37%
<i>Côte d'Ivoire</i>	755	30	129	159	21.06%	17.09%
<i>Denmark</i>	5,857	85	39	124	2.12%	0.67%
<i>Djibouti</i>	21	1	7	8	38.10%	33.33%
<i>Dominica</i>	193	4	16	20	10.36%	8.29%
<i>Dominican Republic</i>	6,011	140	198	338	5.62%	3.29%
<i>Ecuador</i>	5,729	170	111	281	4.91%	1.94%
<i>Egypt</i>	5,562	157	290	447	8.04%	5.21%
<i>El Salvador</i>	1,833	49	55	104	5.67%	3.00%
<i>Equatorial Guinea</i>	284	37	58	95	33.45%	20.42%
<i>Eritrea</i>	117	3	88	91	77.78%	75.21%
<i>Estonia</i>	871	7	14	21	2.41%	1.61%
<i>Ethiopia</i>	1,110	35	241	276	24.87%	21.71%
<i>Fiji</i>	101	3	16	19	18.81%	15.84%
<i>Finland</i>	2,970	48	27	75	2.53%	0.91%
<i>France</i>	38,462	652	338	990	2.57%	0.88%
<i>Gabon</i>	406	26	95	121	29.80%	23.40%
<i>Gambia, The</i>	196	4	57	61	31.12%	29.08%
<i>Georgia</i>	950	19	35	54	5.68%	3.68%
<i>Germany</i>	45,843	540	431	971	2.12%	0.94%
<i>Ghana</i>	1,952	50	169	219	11.22%	8.66%
<i>Greece</i>	3,977	65	30	95	2.39%	0.75%
<i>Grenada</i>	212	9	17	26	12.26%	8.02%
<i>Guatemala</i>	2,336	83	43	126	5.39%	1.84%
<i>Guinea</i>	157	2	41	43	27.39%	26.12%
<i>Guinea-Bissau</i>	8	-	1	1	12.50%	12.50%
<i>Guyana</i>	260	13	15	28	10.77%	5.77%
<i>Haiti</i>	982	24	95	119	12.12%	9.67%
<i>Holy See</i>	3	-	-	-	0.00%	0.00%
<i>Honduras</i>	2,516	91	89	180	7.15%	3.54%
<i>Hungary</i>	3,633	51	29	80	2.20%	0.80%
<i>Iceland</i>	908	13	8	21	2.31%	0.88%
<i>India</i>	98,970	1,561	3,014	4,575	4.62%	3.05%
<i>Indonesia</i>	10,018	311	350	661	6.60%	3.49%
<i>Iran</i>	3,567	81	238	319	8.94%	6.67%
<i>Iraq</i>	1,300	84	215	299	23.00%	16.54%
<i>Ireland</i>	13,971	146	121	267	1.91%	0.87%

Table 4 FY 2016 Overstay rates for nonimmigrant students and exchange visitors (F, M, J) admitted to the United States via air and sea POEs (excluding Canada and Mexico)						
Country of Citizenship	Expected Departures	Out-of-Country Overstays	Suspected In-Country Overstays	Total Overstays	Total Overstay Rate	Suspected In-Country Overstay Rate
<i>Israel</i>	10,476	219	194	413	3.94%	1.85%
<i>Italy</i>	21,346	332	219	551	2.58%	1.03%
<i>Jamaica</i>	8,967	190	525	715	7.97%	5.86%
<i>Japan</i>	53,162	944	607	1,551	2.92%	1.14%
<i>Jordan</i>	3,489	136	296	432	12.38%	8.48%
<i>Kazakhstan</i>	5,715	169	234	403	7.05%	4.09%
<i>Kenya</i>	2,326	52	288	340	14.62%	12.38%
<i>Kiribati</i>	32	2	2	4	12.50%	6.25%
<i>Korea, North</i>	11	-	3	3	27.27%	27.27%
<i>Korea, South</i>	101,027	3,043	2,068	5,111	5.06%	2.05%
<i>Kuwait</i>	11,064	421	220	641	5.79%	1.99%
<i>Kyrgyzstan</i>	666	17	96	113	16.97%	14.41%
<i>Laos</i>	160	5	6	11	6.88%	3.75%
<i>Latvia</i>	706	19	9	28	3.97%	1.28%
<i>Lebanon</i>	2,514	55	50	105	4.18%	1.99%
<i>Lesotho</i>	81	1	2	3	3.70%	2.47%
<i>Liberia</i>	218	11	29	40	18.35%	13.30%
<i>Libya</i>	1,036	113	330	443	42.76%	31.85%
<i>Liechtenstein</i>	30	1	-	1	3.33%	0.00%
<i>Lithuania</i>	1,920	19	19	38	1.98%	0.99%
<i>Luxembourg</i>	258	6	4	10	3.88%	1.55%
<i>Macedonia</i>	1,658	26	182	208	12.55%	10.98%
<i>Madagascar</i>	144	14	8	22	15.28%	5.56%
<i>Malawi</i>	250	1	36	37	14.80%	14.40%
<i>Malaysia</i>	6,641	188	222	410	6.17%	3.34%
<i>Maldives</i>	74	2	6	8	10.81%	8.11%
<i>Mali</i>	349	18	60	78	22.35%	17.19%
<i>Malta</i>	66	2	3	5	7.58%	4.55%
<i>Marshall Islands</i>	6	-	-	-	0.00%	0.00%
<i>Mauritania</i>	117	7	11	18	15.39%	9.40%
<i>Mauritius</i>	276	4	7	11	3.99%	2.54%
<i>Micronesia, Federated States of</i>	3	-	-	-	0.00%	0.00%
<i>Moldova</i>	2,299	58	586	644	28.01%	25.49%
<i>Monaco</i>	48	2	-	2	4.17%	0.00%
<i>Mongolia</i>	2,399	124	347	471	19.63%	14.46%
<i>Montenegro</i>	604	28	57	85	14.07%	9.44%
<i>Morocco</i>	2,258	56	113	169	7.48%	5.00%
<i>Mozambique</i>	173	5	14	19	10.98%	8.09%
<i>Namibia</i>	139	8	12	20	14.39%	8.63%
<i>Nauru</i>	2	-	-	-	0.00%	0.00%
<i>Nepal</i>	2,873	52	675	727	25.31%	23.50%
<i>Netherlands</i>	8,781	145	85	230	2.62%	0.97%

Table 4 FY 2016 Overstay rates for nonimmigrant students and exchange visitors (F, M, J) admitted to the United States via air and sea POEs (excluding Canada and Mexico)						
Country of Citizenship	Expected Departures	Out-of-Country Overstays	Suspected In-Country Overstays	Total Overstays	Total Overstay Rate	Suspected In-Country Overstay Rate
<i>New Zealand</i>	4,279	141	37	178	4.16%	0.87%
<i>Nicaragua</i>	791	18	10	28	3.54%	1.26%
<i>Niger</i>	174	6	21	27	15.52%	12.07%
<i>Nigeria</i>	8,034	267	1,827	2,094	26.06%	22.74%
<i>Norway</i>	7,434	153	44	197	2.65%	0.59%
<i>Oman</i>	2,439	92	34	126	5.17%	1.39%
<i>Pakistan</i>	6,775	165	362	527	7.78%	5.34%
<i>Palau</i>	1	-	-	-	0.00%	0.00%
<i>Panama</i>	3,649	120	75	195	5.34%	2.06%
<i>Papua New Guinea</i>	158	16	19	35	22.15%	12.03%
<i>Paraguay</i>	1,200	40	26	66	5.50%	2.17%
<i>Peru</i>	10,501	158	210	368	3.50%	2.00%
<i>Philippines</i>	10,169	171	763	934	9.19%	7.50%
<i>Poland</i>	8,058	99	110	209	2.59%	1.37%
<i>Portugal</i>	3,019	79	58	137	4.54%	1.92%
<i>Qatar</i>	2,220	117	24	141	6.35%	1.08%
<i>Romania</i>	7,372	147	284	431	5.85%	3.85%
<i>Russia</i>	12,707	377	497	874	6.88%	3.91%
<i>Rwanda</i>	997	38	97	135	13.54%	9.73%
<i>Saint Kitts and Nevis</i>	225	5	10	15	6.67%	4.44%
<i>Saint Lucia</i>	300	15	21	36	12.00%	7.00%
<i>Saint Vincent and the Grenadines</i>	111	6	6	12	10.81%	5.41%
<i>Samoa</i>	37	2	3	5	13.51%	8.11%
<i>San Marino</i>	8	-	-	-	0.00%	0.00%
<i>Sao Tome and Principe</i>	5	-	-	-	0.00%	0.00%
<i>Saudi Arabia</i>	100,024	5,170	1,658	6,828	6.83%	1.66%
<i>Senegal</i>	675	25	85	110	16.30%	12.59%
<i>Serbia</i>	4,800	155	598	753	15.69%	12.46%
<i>Seychelles</i>	29	-	1	1	3.45%	3.45%
<i>Sierra Leone</i>	171	5	13	18	10.53%	7.60%
<i>Singapore</i>	7,943	165	81	246	3.10%	1.02%
<i>Slovakia</i>	4,026	48	42	90	2.24%	1.04%
<i>Slovenia</i>	687	7	6	13	1.89%	0.87%
<i>Solomon Islands</i>	21	-	1	1	4.76%	4.76%
<i>Somalia</i>	25	2	5	7	28.00%	20.00%
<i>South Africa</i>	4,426	128	164	292	6.60%	3.71%
<i>South Sudan</i>	50	-	2	2	4.00%	4.00%
<i>Spain</i>	26,838	515	286	801	2.99%	1.07%
<i>Sri Lanka</i>	1,774	70	155	225	12.68%	8.74%
<i>Sudan</i>	304	5	31	36	11.84%	10.20%
<i>Suriname</i>	163	1	1	2	1.23%	0.61%
<i>Swaziland</i>	153	7	5	12	7.84%	3.27%

Table 4 FY 2016 Overstay rates for nonimmigrant students and exchange visitors (F, M, J) admitted to the United States via air and sea POEs (excluding Canada and Mexico)						
Country of Citizenship	Expected Departures	Out-of-Country Overstays	Suspected In-Country Overstays	Total Overstays	Total Overstay Rate	Suspected In-Country Overstay Rate
<i>Sweden</i>	10,843	188	125	313	2.89%	1.15%
<i>Switzerland</i>	8,523	131	45	176	2.07%	0.53%
<i>Syria</i>	599	25	62	87	14.52%	10.35%
<i>Taiwan</i>	30,070	770	365	1,135	3.78%	1.21%
<i>Tajikistan</i>	486	12	65	77	15.84%	13.37%
<i>Tanzania</i>	939	42	85	127	13.53%	9.05%
<i>Thailand</i>	18,189	511	847	1,358	7.47%	4.66%
<i>Timor-Leste</i>	32	1	3	4	12.50%	9.38%
<i>Togo</i>	176	7	46	53	30.11%	26.14%
<i>Tonga</i>	62	6	7	13	20.97%	11.29%
<i>Trinidad and Tobago</i>	2,208	61	49	110	4.98%	2.22%
<i>Tunisia</i>	1,173	52	40	92	7.84%	3.41%
<i>Turkey</i>	24,836	637	611	1,248	5.03%	2.46%
<i>Turkmenistan</i>	371	12	34	46	12.40%	9.16%
<i>Tuvalu</i>	2	-	-	-	0.00%	0.00%
<i>Uganda</i>	826	16	88	104	12.59%	10.65%
<i>Ukraine</i>	7,757	202	1,001	1,203	15.51%	12.90%
<i>United Arab Emirates</i>	4,464	132	40	172	3.85%	0.90%
<i>United Kingdom</i>	44,027	761	322	1,083	2.46%	0.73%
<i>Uruguay</i>	821	19	22	41	4.99%	2.68%
<i>Uzbekistan</i>	1,181	63	112	175	14.82%	9.48%
<i>Vanuatu</i>	8	1	-	1	12.50%	0.00%
<i>Venezuela</i>	13,817	490	712	1,202	8.70%	5.15%
<i>Vietnam</i>	14,878	648	1,212	1,860	12.50%	8.15%
<i>Yemen</i>	911	33	64	97	10.65%	7.03%
<i>Zambia</i>	414	9	39	48	11.59%	9.42%
<i>Zimbabwe</i>	1,017	25	69	94	9.24%	6.79%
TOTAL	1,457,556	38,869	40,949	79,818	5.48%	2.81%

E. Overstay Rates for All Other In-scope Classes of Admission

Country of Citizenship	Expected Departures	Out-of-Country Overstays	Suspected In-Country Overstays	Total Overstays	Total Overstay Rate	Suspected In-Country Overstay Rate
<i>Afghanistan</i>	204	3	116	119	58.33%	56.86%
<i>Albania</i>	458	14	73	87	19.00%	15.94%
<i>Algeria</i>	471	11	15	26	5.52%	3.19%
<i>Andorra</i>	90	-	1	1	1.11%	1.11%
<i>Angola</i>	661	8	15	23	3.48%	2.27%
<i>Antigua and Barbuda</i>	50	-	6	6	12.00%	12.00%
<i>Argentina</i>	17,895	114	126	240	1.34%	0.70%
<i>Armenia</i>	439	9	43	52	11.85%	9.80%
<i>Australia</i>	54,324	360	333	693	1.28%	0.61%
<i>Austria</i>	5,510	20	43	63	1.14%	0.78%
<i>Azerbaijan</i>	211	-	6	6	2.84%	2.84%
<i>Bahamas, The</i>	708	6	15	21	2.97%	2.12%
<i>Bahrain</i>	49	-	1	1	2.04%	2.04%
<i>Bangladesh</i>	920	35	107	142	15.44%	11.63%
<i>Barbados</i>	424	-	4	4	0.94%	0.94%
<i>Belarus</i>	942	15	39	54	5.73%	4.14%
<i>Belgium</i>	9,494	36	37	73	0.77%	0.39%
<i>Belize</i>	397	9	23	32	8.06%	5.79%
<i>Benin</i>	47	-	9	9	19.15%	19.15%
<i>Bhutan</i>	36	1	7	8	22.22%	19.44%
<i>Bolivia</i>	1,131	8	41	49	4.33%	3.63%
<i>Bosnia and Herzegovina</i>	427	14	77	91	21.31%	18.03%
<i>Botswana</i>	41	1	8	9	21.95%	19.51%
<i>Brazil</i>	33,224	298	614	912	2.75%	1.85%
<i>Brunei</i>	32	-	2	2	6.25%	6.25%
<i>Bulgaria</i>	2,306	59	74	133	5.77%	3.21%
<i>Burkina Faso</i>	148	1	7	8	5.41%	4.73%
<i>Burma</i>	120	3	23	26	21.67%	19.17%
<i>Burundi</i>	28	1	6	7	25.00%	21.43%
<i>Cabo Verde</i>	160	6	116	122	76.25%	72.50%
<i>Cambodia</i>	301	13	125	138	45.85%	41.53%
<i>Cameroon</i>	395	4	86	90	22.79%	21.77%
<i>Central African Republic</i>	9	-	-	-	0.00%	0.00%
<i>Chad</i>	13	-	5	5	38.46%	38.46%
<i>Chile</i>	6,377	59	66	125	1.96%	1.04%
<i>China</i>	53,405	552	833	1,385	2.59%	1.56%
<i>Colombia</i>	18,163	155	585	740	4.07%	3.22%

³⁴ Table 5 complete list of applicable admission classes: A3, CW1, CW2, E1, E2, E2C, E3, E3D, G5, H1B, H1B1, H1C, H2A, H2B, H2R, H3, H4, K1, K2, K3, K4, L1A, L1B, L2, NATO7, N8, N9, O1, O2, O3, P1, P2, P3, P4, Q1, R1, R2, TN, TD, V1, V2, V3

Table 5
FY 2016 Overstay rates for other in-scope nonimmigrant classes of admissions admitted to the United States via air and sea POEs for all countries (excluding Canada and Mexico)³⁴

Country of Citizenship	Expected Departures	Out-of-Country Overstays	Suspected In-Country Overstays	Total Overstays	Total Overstay Rate	Suspected In-Country Overstay Rate
<i>Comoros</i>	6	-	1	1	16.67%	16.67%
<i>Congo (Brazzaville)</i>	55	1	10	11	20.00%	18.18%
<i>Congo (Kinshasa)</i>	125	2	13	15	12.00%	10.40%
<i>Costa Rica</i>	3,187	36	98	134	4.21%	3.08%
<i>Croatia</i>	1,167	10	19	29	2.49%	1.63%
<i>Cuba</i>	1,057	48	89	137	12.96%	8.42%
<i>Cyprus</i>	351	5	3	8	2.28%	0.86%
<i>Czech Republic</i>	2,809	16	24	40	1.42%	0.85%
<i>Côte d'Ivoire</i>	170	2	39	41	24.12%	22.94%
<i>Denmark</i>	8,477	45	22	67	0.79%	0.26%
<i>Djibouti</i>	1	-	-	-	0.00%	0.00%
<i>Dominica</i>	102	1	3	4	3.92%	2.94%
<i>Dominican Republic</i>	8,415	119	1,021	1,140	13.55%	12.13%
<i>Ecuador</i>	2,891	28	125	153	5.29%	4.32%
<i>Egypt</i>	2,872	29	140	169	5.88%	4.88%
<i>El Salvador</i>	2,398	29	245	274	11.43%	10.22%
<i>Equatorial Guinea</i>	41	1	1	2	4.88%	2.44%
<i>Eritrea</i>	56	2	22	24	42.86%	39.29%
<i>Estonia</i>	641	1	3	4	0.62%	0.47%
<i>Ethiopia</i>	637	6	118	124	19.47%	18.52%
<i>Fiji</i>	126	-	5	5	3.97%	3.97%
<i>Finland</i>	5,493	23	29	52	0.95%	0.53%
<i>France</i>	72,391	478	346	824	1.14%	0.48%
<i>Gabon</i>	27	1	1	2	7.41%	3.70%
<i>Gambia, The</i>	34	-	11	11	32.35%	32.35%
<i>Georgia</i>	250	4	8	12	4.80%	3.20%
<i>Germany</i>	73,187	281	308	589	0.81%	0.42%
<i>Ghana</i>	849	8	92	100	11.78%	10.84%
<i>Greece</i>	3,803	19	32	51	1.34%	0.84%
<i>Grenada</i>	117	2	5	7	5.98%	4.27%
<i>Guatemala</i>	6,555	767	1,090	1,857	28.33%	16.63%
<i>Guinea</i>	89	2	33	35	39.33%	37.08%
<i>Guinea-Bissau</i>	4	-	2	2	50.00%	50.00%
<i>Guyana</i>	167	3	46	49	29.34%	27.55%
<i>Haiti</i>	1,498	13	575	588	39.25%	38.39%
<i>Holy See</i>	-	-	-	-	0.00%	0.00%
<i>Honduras</i>	3,034	202	475	677	22.31%	15.66%
<i>Hungary</i>	3,198	35	29	64	2.00%	0.91%
<i>Iceland</i>	1,082	5	5	10	0.92%	0.46%
<i>India</i>	339,076	2,402	5,659	8,061	2.38%	1.67%
<i>Indonesia</i>	2,512	47	121	168	6.69%	4.82%
<i>Iran</i>	632	21	82	103	16.30%	12.98%

Table 5
FY 2016 Overstay rates for other in-scope nonimmigrant classes of admissions admitted to the United States via air and sea POEs for all countries (excluding Canada and Mexico)³⁴

Country of Citizenship	Expected Departures	Out-of-Country Overstays	Suspected In-Country Overstays	Total Overstays	Total Overstay Rate	Suspected In-Country Overstay Rate
<i>Iraq</i>	183	4	32	36	19.67%	17.49%
<i>Ireland</i>	18,939	210	107	317	1.67%	0.57%
<i>Israel</i>	16,507	128	115	243	1.47%	0.70%
<i>Italy</i>	35,741	165	205	370	1.04%	0.57%
<i>Jamaica</i>	16,545	1,619	1,109	2,728	16.49%	6.70%
<i>Japan</i>	148,599	469	413	882	0.59%	0.28%
<i>Jordan</i>	674	9	32	41	6.08%	4.75%
<i>Kazakhstan</i>	758	8	34	42	5.54%	4.49%
<i>Kenya</i>	1,243	15	102	117	9.41%	8.21%
<i>Kiribati</i>	16	-	-	-	0.00%	0.00%
<i>Korea, North</i>	5	-	-	-	0.00%	0.00%
<i>Korea, South</i>	36,818	273	447	720	1.96%	1.21%
<i>Kuwait</i>	77	3	-	3	3.90%	0.00%
<i>Kyrgyzstan</i>	146	2	15	17	11.64%	10.27%
<i>Laos</i>	194	7	120	127	65.46%	61.86%
<i>Latvia</i>	647	5	8	13	2.01%	1.24%
<i>Lebanon</i>	1,571	11	38	49	3.12%	2.42%
<i>Lesotho</i>	34	1	1	2	5.88%	2.94%
<i>Liberia</i>	73	-	49	49	67.12%	67.12%
<i>Libya</i>	58	1	10	11	18.97%	17.24%
<i>Liechtenstein</i>	20	-	-	-	0.00%	0.00%
<i>Lithuania</i>	820	8	16	24	2.93%	1.95%
<i>Luxembourg</i>	238	1	1	2	0.84%	0.42%
<i>Macedonia</i>	254	14	29	43	16.93%	11.42%
<i>Madagascar</i>	44	-	3	3	6.82%	6.82%
<i>Malawi</i>	45	-	5	5	11.11%	11.11%
<i>Malaysia</i>	4,597	31	70	101	2.20%	1.52%
<i>Maldives</i>	1	-	-	-	0.00%	0.00%
<i>Mali</i>	103	1	15	16	15.53%	14.56%
<i>Malta</i>	173	-	-	-	0.00%	0.00%
<i>Marshall Islands</i>	1	1	-	1	100.00%	0.00%
<i>Mauritania</i>	32	-	1	1	3.13%	3.13%
<i>Mauritius</i>	168	1	-	1	0.60%	0.00%
<i>Micronesia, Federated States of</i>	-	-	-	-	0.00%	0.00%
<i>Moldova</i>	385	6	43	49	12.73%	11.17%
<i>Monaco</i>	14	-	-	-	0.00%	0.00%
<i>Mongolia</i>	212	3	19	22	10.38%	8.96%
<i>Montenegro</i>	123	2	4	6	4.88%	3.25%
<i>Morocco</i>	888	13	85	98	11.04%	9.57%
<i>Mozambique</i>	62	-	2	2	3.23%	3.23%
<i>Namibia</i>	50	-	-	-	0.00%	0.00%

Table 5
FY 2016 Overstay rates for other in-scope nonimmigrant classes of admissions admitted to the United States via air and sea POEs for all countries (excluding Canada and Mexico)³⁴

Country of Citizenship	Expected Departures	Out-of-Country Overstays	Suspected In-Country Overstays	Total Overstays	Total Overstay Rate	Suspected In-Country Overstay Rate
<i>Nauru</i>	1	-	-	-	0.00%	0.00%
<i>Nepal</i>	1,205	9	78	87	7.22%	6.47%
<i>Netherlands</i>	22,210	108	100	208	0.94%	0.45%
<i>New Zealand</i>	5,829	58	51	109	1.87%	0.88%
<i>Nicaragua</i>	1,325	32	71	103	7.77%	5.36%
<i>Niger</i>	39	1	5	6	15.39%	12.82%
<i>Nigeria</i>	3,268	36	471	507	15.51%	14.41%
<i>Norway</i>	7,102	37	36	73	1.03%	0.51%
<i>Oman</i>	113	-	2	2	1.77%	1.77%
<i>Pakistan</i>	3,761	47	258	305	8.11%	6.86%
<i>Palau</i>	1	-	-	-	0.00%	0.00%
<i>Panama</i>	1,254	3	21	24	1.91%	1.68%
<i>Papua New Guinea</i>	5	1	-	1	20.00%	0.00%
<i>Paraguay</i>	345	3	10	13	3.77%	2.90%
<i>Peru</i>	5,973	123	493	616	10.31%	8.25%
<i>Philippines</i>	22,604	971	5,552	6,523	28.86%	24.56%
<i>Poland</i>	6,203	53	81	134	2.16%	1.31%
<i>Portugal</i>	4,653	31	30	61	1.31%	0.65%
<i>Qatar</i>	38	-	-	-	0.00%	0.00%
<i>Romania</i>	4,198	66	169	235	5.60%	4.03%
<i>Russia</i>	11,991	171	319	490	4.09%	2.66%
<i>Rwanda</i>	63	-	10	10	15.87%	15.87%
<i>Saint Kitts and Nevis</i>	100	-	1	1	1.00%	1.00%
<i>Saint Lucia</i>	134	5	10	15	11.19%	7.46%
<i>Saint Vincent and the Grenadines</i>	33	-	3	3	9.09%	9.09%
<i>Samoa</i>	51	-	7	7	13.73%	13.73%
<i>San Marino</i>	3	-	-	-	0.00%	0.00%
<i>Sao Tome and Principe</i>	3	-	-	-	0.00%	0.00%
<i>Saudi Arabia</i>	1,608	18	16	34	2.11%	1.00%
<i>Senegal</i>	286	2	29	31	10.84%	10.14%
<i>Serbia</i>	1,627	29	107	136	8.36%	6.58%
<i>Seychelles</i>	3	-	-	-	0.00%	0.00%
<i>Sierra Leone</i>	54	-	24	24	44.44%	44.44%
<i>Singapore</i>	5,440	43	59	102	1.88%	1.09%
<i>Slovakia</i>	1,418	21	23	44	3.10%	1.62%
<i>Slovenia</i>	770	7	15	22	2.86%	1.95%
<i>Solomon Islands</i>	2	-	-	-	0.00%	0.00%
<i>Somalia</i>	22	-	16	16	72.73%	72.73%
<i>South Africa</i>	9,157	204	206	410	4.48%	2.25%
<i>South Sudan</i>	20	-	10	10	50.00%	50.00%
<i>Spain</i>	37,771	200	127	327	0.87%	0.34%

Table 5

FY 2016 Overstay rates for other in-scope nonimmigrant classes of admissions admitted to the United States via air and sea POEs for all countries (excluding Canada and Mexico)³⁴

Country of Citizenship	Expected Departures	Out-of-Country Overstays	Suspected In-Country Overstays	Total Overstays	Total Overstay Rate	Suspected In-Country Overstay Rate
<i>Sri Lanka</i>	1,083	7	41	48	4.43%	3.79%
<i>Sudan</i>	67	4	5	9	13.43%	7.46%
<i>Suriname</i>	57	-	2	2	3.51%	3.51%
<i>Swaziland</i>	25	-	-	-	0.00%	0.00%
<i>Sweden</i>	15,233	74	59	133	0.87%	0.39%
<i>Switzerland</i>	8,395	37	42	79	0.94%	0.50%
<i>Syria</i>	271	9	72	81	29.89%	26.57%
<i>Taiwan</i>	12,378	71	98	169	1.37%	0.79%
<i>Tajikistan</i>	33	2	5	7	21.21%	15.15%
<i>Tanzania</i>	276	2	20	22	7.97%	7.25%
<i>Thailand</i>	3,122	70	402	472	15.12%	12.88%
<i>Timor-Leste</i>	1	-	-	-	0.00%	0.00%
<i>Togo</i>	58	1	17	18	31.03%	29.31%
<i>Tonga</i>	120	-	13	13	10.83%	10.83%
<i>Trinidad and Tobago</i>	3,294	18	44	62	1.88%	1.34%
<i>Tunisia</i>	301	1	7	8	2.66%	2.33%
<i>Turkey</i>	7,247	90	119	209	2.88%	1.64%
<i>Turkmenistan</i>	47	1	7	8	17.02%	14.89%
<i>Tuvalu</i>	1	-	-	-	0.00%	0.00%
<i>Uganda</i>	536	5	55	60	11.19%	10.26%
<i>Ukraine</i>	5,234	102	456	558	10.66%	8.71%
<i>United Arab Emirates</i>	115	2	8	10	8.70%	6.96%
<i>United Kingdom</i>	137,174	973	696	1,669	1.22%	0.51%
<i>Uruguay</i>	1,166	9	15	24	2.06%	1.29%
<i>Uzbekistan</i>	280	6	20	26	9.29%	7.14%
<i>Vanuatu</i>	16	-	1	1	6.25%	6.25%
<i>Venezuela</i>	20,276	149	309	458	2.26%	1.52%
<i>Vietnam</i>	2,727	64	752	816	29.92%	27.58%
<i>Yemen</i>	84	-	28	28	33.33%	33.33%
<i>Zambia</i>	155	2	9	11	7.10%	5.81%
<i>Zimbabwe</i>	483	6	19	25	5.18%	3.93%
TOTAL	1,427,188	13,504	29,498	43,002	3.01%	2.07%

F. Canada and Mexico Nonimmigrant Overstay Rates

Table 6 FY 2016 Overstay rates for Canadian and Mexican nonimmigrants admitted to the United States via air and sea POEs						
Country of Citizenship (admission class)	Expected Departures	Out-of-Country Overstays	Suspected In-Country Overstays	Total Overstays	Total Overstay Rate	Suspected In-Country Overstay Rate
<i>Canada (B1/B2)</i>	8,620,361	7,128	117,267	124,395	1.44%	1.36%
<i>Mexico (B1/B2)</i>	2,927,848	4,110	43,742	47,852	1.63%	1.49%
<i>B1/B2 Total</i>	<i>11,548,209</i>	<i>11,238</i>	<i>161,009</i>	<i>172,247</i>	<i>1.49%</i>	<i>1.39%</i>
<i>Canada (F, M, J)</i>	54,786	783	806	1,589	2.90%	1.47%
<i>Mexico (F, M, J)</i>	37,157	789	738	1,527	4.11%	1.99%
<i>F, M, J Total</i>	<i>91,943³⁵</i>	<i>1,572³⁶</i>	<i>1,544³⁷</i>	<i>3,116</i>	<i>3.39%</i>	<i>1.68%</i>
<i>Canada (Other In-Scope)</i>	333,349	1,982	1,345	3,327	1.00%	0.40%
<i>Mexico (Other In-Scope)</i>	114,519	1,401	2,178	3,579	3.13%	1.90%
<i>Other In-Scope Total</i>	<i>447,868</i>	<i>3,383</i>	<i>3,523</i>	<i>6,906</i>	<i>1.54%</i>	<i>0.79%</i>
<i>Canada Total</i>	<i>9,008,496</i>	<i>9,893</i>	<i>119,418</i>	<i>129,311</i>	<i>1.44%</i>	<i>1.33%</i>
<i>Mexico Total</i>	<i>3,079,524</i>	<i>6,300</i>	<i>46,658</i>	<i>52,958</i>	<i>1.72%</i>	<i>1.52%</i>
Grand Total	12,088,020	16,193	166,076	182,269	1.51%	1.37%

Table 6 represents Canadian and Mexican nonimmigrant visitors admitted at air and sea POEs who were expected to depart in FY 2016. Unlike all other countries, the overwhelming majority of travelers from Canada or Mexico enter the United States by land. Overstay data concerning land entries will be incorporated into future iterations of this report as projects progress.

³⁵ The Canada and Mexico Expected Departure total comprises of 64,370 for the F visa category, 1,290 for the M visa category, 26,283 for the J visa category

³⁶ The Canada and Mexico Out-of-Country Overstay total comprises of 1,247 for the F visa category, 41 for the M visa category, 284 for the J visa category

³⁷ The Canada and Mexico Suspected In-Country Overstay total comprises of 899 for the F visa category, 40 for the M visa category, 605 for the J visa category

V. Conclusion

Identifying overstays is important for national security, public safety, immigration enforcement, and processing applications for immigration benefits.

Over the years, DHS has significantly improved data collection processes in the entry environment. These improvements include the collection of data on all admissions to the United States by foreign nationals, the reduction of the number of documents that are usable for entry to the United States, the collection of biometric data on most foreign travelers to the United States, and the comparison of that data against criminal and terrorist watchlists. Despite the different infrastructural, operational, and logistical challenges presented in the exit environment, DHS has been able to resolve many of the issues regarding the collection of departure information for foreign nationals. Further efforts, including partnerships with other governments and the private sector (e.g., airlines airports, cruise lines, etc.), are ongoing and will continue to improve the existing process for improved data integrity.

During the past two years, DHS has made significant progress in terms of the ability to accurately report data on overstays—progress that was made possible by congressional realignment of Department resources in order to better centralize the overall mission in identifying overstays. During FY 2016, through new biometric exit tests and the BE-Mobile law enforcement tool, DHS was able to biometrically verify the biographic departure data for a limited number of departures from the United States in the air, land, and sea environments. While these only account for a very small percentage of all the biographic departure records for that FY, it is an important first step towards implementing a comprehensive biometric entry and exit system.

DHS will continue to develop and test the entry and exit system during FY 2017, both biometric and biographic, which will improve the ability of CBP to report this data accurately. DHS will continue to annually and publicly release this overstay data, and looks forward to providing updates to congressional members and their staff on its ongoing progress.

VI. Appendices

Appendix A. In-Scope Nonimmigrant Classes of Admission

CLASS OF ADMISSION DESCRIPTION	CODE
Temporary Workers and Trainees	
Commonwealth of the Northern Mariana Islands (CNMI)-only transitional workers	CW1
Spouses and children of CW1	CW2
Temporary workers in specialty occupations	H1B
Chile and Singapore Free Trade Agreement aliens	H1B1
Registered nurses participating in the Nursing Relief for Disadvantaged Areas	H1C
Agricultural workers	H2A
Nonagricultural workers	H2B
Returning H2B workers	H2R
Trainees	H3
Spouses and children of H1, H2, or H3	H4
Workers with extraordinary ability or achievement	O1
Workers accompanying and assisting in performance of O1 workers	O2
Spouses and children of O1 and O2	O3
Internationally recognized athletes or entertainers	P1
Artists or entertainers in reciprocal exchange programs	P2
Artists or entertainers in culturally unique programs	P3
Spouses and children of P1, P2, or P3	P4
Workers in international cultural exchange programs	Q1
Workers in religious occupations	R1
Spouses and children of R1	R2
North American Free Trade Agreement professional workers	TN
Spouses and children of TN	TD
Intracompany Transferees	
Intracompany transferees	L1 ³⁸
Spouses and children of L1	L2
Treaty Traders and Investors	
Treaty traders and their spouses and children	E1

³⁸ Includes L1A and L1B classes of admission

CLASS OF ADMISSION DESCRIPTION	CODE
Treaty investors and their spouses and children	E2
Treaty investors and their spouses and children CNMI only	E2C
Australian Free Trade Agreement principals, spouses and children	E3 ³⁹
Students	
Academic students	F1
Spouses and children of F1	F2
Vocational students	M1
Spouses and children of M1	M2
Exchange Visitors	
Exchange visitors	J1
Spouses and children of J1	J2
Temporary Visitors for Pleasure	
Temporary visitors for pleasure	B2
Visa Waiver Program – temporary visitors for pleasure	WT
Temporary Visitors for Business	
Temporary visitors for business	B1
Visa Waiver Program – temporary visitors for business	WB
Alien Fiancées of U.S. Citizens and Children	
Fiancées of U.S. citizens	K1
Children of K1	K2
Legal Immigration Family Equity LIFE Act	
Spouses of U.S. citizens, visa pending	K3
Children of U.S. citizens, visa pending	K4
Spouses of permanent residents, visa pending	V1
Children of permanent residents, visa pending	V2
Dependents of V1 or V2, visa pending	V3
Other	
Attendants, servants, or personal employees of A1 and A2 and their families	A3
Attendants, servants, or personal employees of diplomats or other representatives	G5
Attendant, servant, personal employer of North Atlantic Treaty Organization (NATO) NATO-1 through NATO-6 or Immediate Family	NATO- 7

³⁹ Includes E3D and E3R classes of admission

Appendix B. Out-of-Scope Nonimmigrant Classes of Admission

CLASS OF ADMISSION DESCRIPTION	CODE
Diplomats and Other Representatives	
Representatives of foreign information media and spouses and children	I1
Ambassadors, public ministers, career diplomatic/consular officers and families	A1
Other foreign government officials or employees and their families	A2
Principals of recognized foreign governments	G1
Other representatives of recognized foreign governments	G2
Representatives of non-recognized or nonmember foreign governments	G3
International organization officers or employees	G4
NATO officials, spouses, and children	NATO-1 to NATO-6
Transit Aliens	
Aliens in continuous and immediate transit through the United States	C1
Aliens in transit to the United Nations	C2
Foreign government officials, their spouses, children, and attendants in transit	C3
Special Classes	
Alien Witness or Informant	S5
Alien Witness or Informant	S6
Qualified Family Member of S5, S6	S7
Victim of Trafficking, Special Protected Class	T1
Spouse of T1, Special Protected Class	T2
Spouse of T1, Special Protected Class	T3
Parent of T1, Special Protected Class	T4
Sibling unmarried of T1, Special Protected Class	T5
Victim of Criminal Activity, Special Protected Class	U1
Spouse of U2, Special Protected Class	U2
Spouse of U1, Special Protected Class	U3
Parent of U1, Special Protected Class	U4
Sibling unmarried of U1, Special Protected Class	U5
Special Protected Class, Violence against Women Act	VAWA
Other	
Crewmen	D1
Crewman-different vessel/flight	D2

Appendix C. FY 2015 Overstay Rates

FY 2015 Entry/Exit Overstay Report Overview

Below are the tabulated rates from the Fiscal Year 2015 Entry and Exit Overstay Report. The inclusion of these tables is for reference only. Unlike the FY 2016 Report, the Fiscal Year 2015 report is limited to foreign nationals who entered the United States as nonimmigrant visitors for business or pleasure through an air or sea port of entry. These individuals represent the vast majority (approximately 87 percent) of annual nonimmigrant air and sea admissions. At the end of FY 2015, the overall Suspected In-Country Overstay number – i.e., those for whom we did not have evidence of a departure or transition to another immigration status – was 482,781 individuals, or 1.07 percent. As included in the report, by January 2016, the number of Suspected In-Country overstays for FY 2015 had dropped to 416,500 individuals, rendering the Suspected In-Country Overstay rate as 0.9 percent. We have since calculated that, as of June 2016, the number of Suspected In-Country overstays for FY 2015 had further dropped to 355,338 individuals, rendering the Suspected In-Country Overstay rate as 0.79 percent.

Country of Citizenship	Expected Departures	Out-of-Country Overstays	Suspected In-Country Overstays	Total Overstays	Total Overstay Rate	Suspected In-Country Overstay Rate
<i>Andorra</i>	1,221	2	3	5	0.41%	0.24%
<i>Australia</i>	1,306,352	878	3,964	4,842	0.37%	0.30%
<i>Austria</i>	210,854	119	2,694	2,813	1.33%	1.28%
<i>Belgium</i>	290,103	158	1,477	1,635	0.56%	0.51%
<i>Brunei</i>	1,143	1	10	11	0.96%	0.87%
<i>Chile</i>	306,598	584	6,553	7,137	2.33%	2.14%
<i>Czech Republic</i>	97,708	186	1,422	1,608	1.65%	1.46%
<i>Denmark</i>	326,334	158	1,812	1,970	0.60%	0.56%
<i>Estonia</i>	20,247	43	191	234	1.16%	0.94%
<i>Finland</i>	153,136	91	747	838	0.55%	0.49%
<i>France</i>	1,767,377	1,434	11,973	13,407	0.76%	0.68%
<i>Germany</i>	2,107,035	1,160	21,394	22,554	1.07%	1.02%
<i>Greece</i>	71,430	320	1,333	1,653	2.31%	1.87%
<i>Hungary</i>	75,904	356	1,860	2,216	2.92%	2.45%
<i>Iceland</i>	51,231	36	199	235	0.46%	0.39%
<i>Ireland</i>	453,597	316	1,797	2,113	0.47%	0.40%
<i>Italy</i>	1,184,715	1,336	17,661	18,997	1.60%	1.49%
<i>Japan</i>	3,014,769	455	5,603	6,058	0.20%	0.19%
<i>Korea, South</i>	1,121,890	1,352	7,120	8,472	0.76%	0.63%

Table 1-D
FY 2015 Overstay rates for nonimmigrant visitors admitted to the United States for business or pleasure
(WB/WT/B-1/B-2) via air and sea POEs for VWP Countries

Country of Citizenship	Expected Departures	Out-of-Country Overstays	Suspected In-Country Overstays	Total Overstays	Total Overstay Rate	Suspected In-Country Overstay Rate
<i>Latvia</i>	18,698	86	273	359	1.92%	1.46%
<i>Liechtenstein</i>	2,048	2	12	14	0.68%	0.59%
<i>Lithuania</i>	26,502	102	480	582	2.20%	1.81%
<i>Luxembourg</i>	14,279	7	75	82	0.57%	0.53%
<i>Malta</i>	5,504	3	44	47	0.85%	0.80%
<i>Monaco</i>	1,136	1	4	5	0.44%	0.35%
<i>Netherlands</i>	709,633	461	7,723	8,184	1.15%	1.09%
<i>New Zealand</i>	298,093	245	1,206	1,451	0.49%	0.40%
<i>Norway</i>	312,600	193	1,230	1,423	0.46%	0.39%
<i>Portugal</i>	165,533	500	3,322	3,822	2.31%	2.01%
<i>San Marino</i>	702	0	16	16	2.28%	2.28%
<i>Singapore</i>	127,804	106	375	481	0.38%	0.29%
<i>Slovakia</i>	44,274	116	927	1,043	2.36%	2.09%
<i>Slovenia</i>	23,669	43	235	278	1.17%	0.99%
<i>Spain</i>	896,833	1,668	10,891	12,559	1.40%	1.21%
<i>Sweden</i>	576,422	354	2,428	2,782	0.48%	0.42%
<i>Switzerland</i>	438,910	279	2,123	2,402	0.55%	0.48%
<i>Taiwan</i>	356,225	704	1,184	1,888	0.53%	0.33%
<i>United Kingdom</i>	4,393,881	2,504	16,446	18,950	0.43%	0.37%
TOTAL	20,974,390	16,359	136,807	153,166	0.73%	0.65%

Table 2-D

FY 2015 Overstay rates for nonimmigrants with B-1/B-2 visas admitted to the United States for business or pleasure via air and sea POEs for non-VWP Countries (excluding Canada and Mexico)

Country Of Citizenship	Expected Departures	Out-of-Country Overstays	Suspected In-Country Overstays	Total Overstays	Total Overstay Rate	Suspected In-Country Overstay Rate
<i>Afghanistan</i>	2,136	13	219	232	10.86%	10.25%
<i>Albania</i>	6,123	24	183	207	3.38%	2.99%
<i>Algeria</i>	9,353	53	240	293	3.13%	2.57%
<i>Angola</i>	10,987	25	268	293	2.67%	2.44%
<i>Antigua and Barbuda</i>	13,485	29	204	233	1.73%	1.51%
<i>Argentina</i>	690,275	237	7,498	7,735	1.12%	1.09%
<i>Armenia</i>	5,962	11	195	206	3.46%	3.27%
<i>Azerbaijan</i>	5,758	8	72	80	1.39%	1.25%
<i>Bahamas, The</i>	220,305	232	1,510	1,742	0.79%	0.69%
<i>Bahrain</i>	7,003	12	68	80	1.14%	0.97%
<i>Bangladesh</i>	28,888	96	1,147	1,243	4.30%	3.97%
<i>Barbados</i>	53,643	57	310	367	0.68%	0.58%
<i>Belarus</i>	11,996	21	229	250	2.08%	1.91%
<i>Belize</i>	24,029	43	531	574	2.39%	2.21%
<i>Benin</i>	2,016	16	129	145	7.19%	6.40%
<i>Bhutan</i>	442	4	106	110	24.89%	23.98%
<i>Bolivia</i>	52,795	54	1,118	1,172	2.22%	2.12%
<i>Bosnia and Herzegovina</i>	6,762	21	146	167	2.47%	2.16%
<i>Botswana</i>	1,832	2	16	18	0.98%	0.87%
<i>Brazil</i>	2,350,140	1,284	35,707	36,991	1.57%	1.52%
<i>Bulgaria</i>	26,311	69	389	458	1.74%	1.48%
<i>Burkina Faso</i>	3,765	24	654	678	18.01%	17.37%
<i>Burma</i>	4,057	15	114	129	3.18%	2.81%
<i>Burundi</i>	863	2	81	83	9.62%	9.39%
<i>Cabo Verde</i>	4,295	10	276	286	6.66%	6.43%
<i>Cambodia</i>	2,497	9	46	55	2.20%	1.84%
<i>Cameroon</i>	7,779	77	607	684	8.79%	7.80%
<i>Central African Republic</i>	160	0	11	11	6.88%	6.88%
<i>Chad</i>	677	14	104	118	17.43%	15.36%
<i>China</i>	1,763,669	2,554	15,692	18,246	1.04%	0.89%
<i>Colombia</i>	935,500	721	16,434	17,155	1.83%	1.76%
<i>Comoros</i>	135	0	3	3	2.22%	2.22%
<i>Congo (Brazzaville)</i>	1,323	5	86	91	6.88%	6.50%
<i>Congo (Kinshasa)</i>	5,003	23	427	450	9.00%	8.53%
<i>Costa Rica</i>	224,101	123	1,986	2,109	0.94%	0.89%
<i>Croatia</i>	20,781	32	194	226	1.09%	0.93%
<i>Cuba</i>	46,826	170	895	1,065	2.27%	1.91%
<i>Cyprus</i>	8,357	19	94	113	1.35%	1.12%
<i>Côte d'Ivoire</i>	5,337	35	216	251	4.70%	4.05%
<i>Djibouti</i>	347	3	93	96	27.67%	26.80%

Table 2-D

FY 2015 Overstay rates for nonimmigrants with B-1/B-2 visas admitted to the United States for business or pleasure via air and sea POEs for non-VWP Countries (excluding Canada and Mexico)

Country Of Citizenship	Expected Departures	Out-of-Country Overstays	Suspected In-Country Overstays	Total Overstays	Total Overstay Rate	Suspected In-Country Overstay Rate
<i>Dominica</i>	6,830	11	258	269	3.94%	3.78%
<i>Dominican Republic</i>	303,095	316	6,990	7,306	2.41%	2.31%
<i>Ecuador</i>	348,064	260	5,612	5,872	1.69%	1.61%
<i>Egypt</i>	74,705	175	1,245	1,420	1.90%	1.67%
<i>El Salvador</i>	137,535	166	3,118	3,284	2.39%	2.27%
<i>Equatorial Guinea</i>	1,212	11	39	50	4.13%	3.22%
<i>Eritrea</i>	2,339	69	382	451	19.28%	16.33%
<i>Ethiopia</i>	14,296	122	492	614	4.30%	3.44%
<i>Fiji</i>	7,361	26	142	168	2.28%	1.93%
<i>Gabon</i>	1,862	12	108	120	6.45%	5.80%
<i>Gambia, The</i>	1,795	20	181	201	11.20%	10.08%
<i>Georgia</i>	6,561	13	803	816	12.44%	12.24%
<i>Ghana</i>	21,846	106	894	1,000	4.58%	4.09%
<i>Grenada</i>	9,109	26	236	262	2.88%	2.59%
<i>Guatemala</i>	236,043	296	5,419	5,715	2.42%	2.30%
<i>Guinea</i>	2,200	19	175	194	8.82%	7.95%
<i>Guinea-Bissau</i>	133	0	6	6	4.51%	4.51%
<i>Guyana</i>	41,747	63	920	983	2.36%	2.20%
<i>Haiti</i>	121,581	559	3,312	3,871	3.18%	2.72%
<i>Holy See</i>	22	0	0	0	0.00%	0.00%
<i>Honduras</i>	161,467	204	4,075	4,279	2.65%	2.52%
<i>India</i>	881,974	1,463	12,885	14,348	1.63%	1.46%
<i>Indonesia</i>	84,103	94	922	1,016	1.21%	1.10%
<i>Iran</i>	24,997	122	564	686	2.74%	2.26%
<i>Iraq</i>	11,147	93	681	774	6.94%	6.11%
<i>Israel</i>	352,627	346	2,375	2,721	0.77%	0.67%
<i>Jamaica</i>	240,126	338	6,614	6,952	2.90%	2.75%
<i>Jordan</i>	33,286	179	1,397	1,576	4.74%	4.20%
<i>Kazakhstan</i>	17,301	38	409	447	2.58%	2.36%
<i>Kenya</i>	18,336	87	475	562	3.07%	2.59%
<i>Kiribati</i>	119	1	1	2	1.68%	0.84%
<i>Korea, North</i>	29	0	1	1	3.45%	3.45%
<i>Kuwait</i>	45,762	344	913	1,257	2.75%	2.00%
<i>Kyrgyzstan</i>	2,128	10	148	158	7.43%	6.95%
<i>Laos</i>	1,513	27	252	279	18.44%	16.66%
<i>Lebanon</i>	39,438	76	930	1,006	2.55%	2.36%
<i>Lesotho</i>	286	0	6	6	2.10%	2.10%
<i>Liberia</i>	4,575	134	412	546	11.93%	9.01%
<i>Libya</i>	1,245	13	56	69	5.54%	4.50%
<i>Macedonia</i>	6,014	24	226	250	4.16%	3.76%
<i>Madagascar</i>	872	1	7	8	0.92%	0.80%
<i>Malawi</i>	1,685	6	74	80	4.75%	4.39%

Table 2-D

FY 2015 Overstay rates for nonimmigrants with B-1/B-2 visas admitted to the United States for business or pleasure via air and sea POEs for non-VWP Countries (excluding Canada and Mexico)

Country Of Citizenship	Expected Departures	Out-of-Country Overstays	Suspected In-Country Overstays	Total Overstays	Total Overstay Rate	Suspected In-Country Overstay Rate
<i>Malaysia</i>	80,451	94	1,430	1,524	1.89%	1.78%
<i>Maldives</i>	243	0	1	1	0.41%	0.41%
<i>Mali</i>	2,801	16	154	170	6.07%	5.50%
<i>Marshall Islands</i>	52	1	2	3	5.77%	3.85%
<i>Mauritania</i>	1,371	12	173	185	13.49%	12.62%
<i>Mauritius</i>	3,094	4	27	31	1.00%	0.87%
<i>Micronesia, Federated States of</i>	25	0	4	4	16.00%	16.00%
<i>Moldova</i>	7,230	19	359	378	5.23%	4.97%
<i>Mongolia</i>	9,972	29	302	331	3.32%	3.03%
<i>Montenegro</i>	3,972	13	148	161	4.05%	3.73%
<i>Morocco</i>	24,695	66	390	456	1.85%	1.58%
<i>Mozambique</i>	1,849	2	36	38	2.06%	1.95%
<i>Namibia</i>	1,560	4	10	14	0.90%	0.64%
<i>Nauru</i>	23	0	0	0	0.00%	0.00%
<i>Nepal</i>	15,332	72	492	564	3.68%	3.21%
<i>Nicaragua</i>	58,759	78	1,167	1,245	2.12%	1.99%
<i>Niger</i>	760	7	25	32	4.21%	3.29%
<i>Nigeria</i>	183,907	627	6,781	7,408	4.03%	3.69%
<i>Oman</i>	5,067	16	41	57	1.13%	0.81%
<i>Pakistan</i>	71,803	180	1,435	1,615	2.25%	2.00%
<i>Palau</i>	55	0	2	2	3.64%	3.64%
<i>Panama</i>	144,320	133	773	906	0.63%	0.54%
<i>Papua New Guinea</i>	686	6	2	8	1.17%	0.29%
<i>Paraguay</i>	28,781	22	466	488	1.70%	1.62%
<i>Peru</i>	268,000	312	4,550	4,862	1.81%	1.70%
<i>Philippines</i>	226,777	436	3,265	3,701	1.63%	1.44%
<i>Poland</i>	171,243	204	2,345	2,549	1.49%	1.37%
<i>Qatar</i>	13,909	68	108	176	1.27%	0.78%
<i>Romania</i>	63,850	165	1,153	1,318	2.06%	1.81%
<i>Russia</i>	289,059	239	2,705	2,944	1.02%	0.94%
<i>Rwanda</i>	2,652	18	92	110	4.15%	3.47%
<i>Saint Kitts and Nevis</i>	11,387	17	237	254	2.23%	2.08%
<i>Saint Lucia</i>	14,100	33	363	396	2.81%	2.57%
<i>Saint Vincent and the Grenadines</i>	9,097	29	335	364	4.00%	3.68%
<i>Samoa</i>	1,856	15	110	125	6.74%	5.93%
<i>Sao Tome and Principe</i>	36	0	0	0	0.00%	0.00%
<i>Saudi Arabia</i>	139,483	544	965	1,509	1.08%	0.69%
<i>Senegal</i>	7,786	23	269	292	3.75%	3.45%
<i>Serbia</i>	20,149	40	336	376	1.87%	1.67%

Table 2-D

FY 2015 Overstay rates for nonimmigrants with B-1/B-2 visas admitted to the United States for business or pleasure via air and sea POEs for non-VWP Countries (excluding Canada and Mexico)

Country Of Citizenship	Expected Departures	Out-of-Country Overstays	Suspected In-Country Overstays	Total Overstays	Total Overstay Rate	Suspected In-Country Overstay Rate
<i>Seychelles</i>	275	1	2	3	1.09%	0.73%
<i>Sierra Leone</i>	2,824	63	86	149	5.28%	3.05%
<i>Solomon Islands</i>	140	0	0	0	0.00%	0.00%
<i>Somalia</i>	144	2	2	4	2.78%	1.39%
<i>South Africa</i>	120,220	139	974	1,113	0.93%	0.81%
<i>South Sudan</i>	235	4	7	11	4.68%	2.98%
<i>Sri Lanka</i>	16,391	34	439	473	2.89%	2.68%
<i>Sudan</i>	3,734	34	278	312	8.36%	7.45%
<i>Suriname</i>	13,111	7	93	100	0.76%	0.71%
<i>Swaziland</i>	626	5	12	17	2.72%	1.92%
<i>Syria</i>	13,430	57	440	497	3.70%	3.28%
<i>Tajikistan</i>	953	7	44	51	5.35%	4.62%
<i>Tanzania</i>	5,711	38	127	165	2.89%	2.22%
<i>Thailand</i>	83,482	172	1,349	1,521	1.82%	1.62%
<i>Timor-Leste</i>	39	0	1	1	2.56%	2.56%
<i>Togo</i>	1,715	15	133	148	8.63%	7.76%
<i>Tonga</i>	2,398	13	150	163	6.80%	6.26%
<i>Trinidad and Tobago</i>	170,215	107	873	980	0.58%	0.51%
<i>Tunisia</i>	8,436	15	135	150	1.78%	1.60%
<i>Turkey</i>	161,878	238	2,227	2,465	1.52%	1.38%
<i>Turkmenistan</i>	1,039	6	52	58	5.58%	5.00%
<i>Tuvalu</i>	43	0	1	1	2.33%	2.33%
<i>Uganda</i>	6,761	34	259	293	4.33%	3.83%
<i>Ukraine</i>	73,230	185	2,299	2,484	3.39%	3.14%
<i>United Arab Emirates</i>	30,623	204	393	597	1.95%	1.28%
<i>Uruguay</i>	76,856	41	1,880	1,921	2.50%	2.45%
<i>Uzbekistan</i>	8,008	34	502	536	6.69%	6.27%
<i>Vanuatu</i>	106	0	2	2	1.89%	1.89%
<i>Venezuela</i>	574,651	487	12,242	12,729	2.22%	2.13%
<i>Vietnam</i>	72,732	394	2,285	2,679	3.68%	3.14%
<i>Yemen</i>	3,537	28	219	247	6.98%	6.19%
<i>Zambia</i>	3,434	14	73	87	2.53%	2.13%
<i>Zimbabwe</i>	6,559	19	140	159	2.42%	2.13%
TOTAL	13,182,807	17,958	210,825	228,783	1.74%	1.60%

Table 3-D FY 2015 Overstay rates for Canadian and Mexican nonimmigrants admitted to the United States for business or pleasure via air and sea POEs						
Country of Citizenship	Expected Departures	Out-of-Country Overstays	Suspected In-Country Overstays	Total Overstays	Total Overstay Rate	Suspected In-Country Overstay Rate
<i>Canada</i>	7,875,054	6,871	93,035	99,906	1.27%	1.18%
<i>Mexico</i>	2,896,130	3,158	42,114	45,272	1.56%	1.45%
TOTAL	10,771,184	10,029	135,149	145,178	1.34%	1.25%

Appendix D. Abbreviation and Acronyms

ABBREVIATION/ACRONYM	DESCRIPTION
ADIS	Arrival and Departure Information System
ATS	Automated Targeting System
BE-Mobile	Biometric Exit Mobile
CBP	U.S. Customs and Border Protection
CBPO	U.S. Customs and Border Protection Officer
CLAIMS3	Computer Linked Application Information Management System 3
CNMI	Commonwealth of the Northern Mariana Islands
CTCEU	Counterterrorism and Criminal Exploitation Unit
DHS	Department of Homeland Security
DOS	Department of State
ERO	Enforcement and Removal Operations
ESTA	Electronic System for Travel Authorization
FY	Fiscal Year
HSI	Homeland Security Investigations
ICE	U.S. Immigration and Customs Enforcement
NATO	North Atlantic Treaty Organization
POE	Port of Entry
SEVIS	Student and Exchange Visitor Information System
SEVP	Student and Exchange Visitor Program
USCIS	U.S. Citizenship and Immigration Services
VAWA	Violence Against Women Act
VWP	Visa Waiver Program



Fiscal Year 2017 Entry/Exit Overstay Report



Homeland
Security

Message from the Secretary

I am pleased to present the following “Fiscal Year 2017 Entry/Exit Overstay Report” prepared by the U.S. Department of Homeland Security (DHS). Pursuant to the requirements contained in Section 2(a) of the *Immigration and Naturalization Service Data Management Improvement Act of 2000* (Pub. L. No. 106-215) and the FY 2018 Joint Explanatory Statement, DHS is submitting this report on overstay data.

DHS has generated this report to provide data on departures and overstays, by country, for foreign visitors to the United States who were expected to depart in Fiscal Year (FY) 2017 (October 1, 2016 - September 30, 2017). DHS is working with the U.S. Department of State (DOS) to share information on departures and overstays, especially as it pertains to the visa application and adjudication process, with the goals of increasing visa compliance and decreasing overstay numbers and rates.

This report is being provided to the following Members of Congress:

The Honorable Charles E. Grassley
Chairman, Senate Committee on Judiciary

The Honorable Dianne Feinstein
Ranking Member, Senate Committee on Judiciary

The Honorable Bob Goodlatte
Chairman, House Committee on Judiciary

The Honorable Jerrold Nadler
Ranking Member, House Committee on Judiciary

The Honorable Kevin Yoder
Chairman, House Appropriations Subcommittee on Homeland Security

The Honorable Lucille Roybal-Allard
Ranking Member, House Appropriations Subcommittee on Homeland Security

The Honorable Shelley Moore-Capito
Chairman, Senate Appropriations Subcommittee on Homeland Security

The Honorable Jon Tester
Ranking Member, Senate Appropriations Subcommittee on Homeland Security

Inquiries relating to this report may be directed to the DHS Office of Legislative Affairs at (202) 447-5890.

Best Regards,

A handwritten signature in black ink, appearing to read "Kirstjen Nielsen", with a stylized flourish at the end.

Kirstjen M. Nielsen

Executive Summary

This report provides data on expected departures and overstay, by country, for foreign travelers to the United States who entered as nonimmigrants through an air or sea port of entry (POE) and who were expected to depart in FY 2017 (October 1, 2016 – September 30, 2017). It does this by examining the number of entries, by country, for foreign travelers who arrived as nonimmigrants during this time as of October 1, 2017.

An overstay is a nonimmigrant who was lawfully admitted to the United States for an authorized period, but remained in the United States beyond his or her authorized period of admission. The authorized admission period can be a fixed period; or for the duration of a certain activity, such as the period during which a student is pursuing a full course of study or any authorized technical/practical training. DHS identifies two types of overstays: 1) individuals for whom no departure has been recorded (Suspected In-Country Overstays), and 2) individuals whose departure was recorded after their authorized period of admission expired (Out-of-Country Overstays).

Determining lawful status requires more than solely matching entry and exit data. For example, a person may receive from U.S. Customs and Border Protection (CBP) a six-month admission upon entry, and then he or she may subsequently apply for and receive from U.S. Citizenship and Immigration Services (USCIS) an extension of up to six months. Identifying extensions, changes, or adjustments of status are necessary steps to determine whether a person has overstayed their authorized period of admission.

Valid periods of admission to the United States vary; therefore, it was necessary to establish “cutoff dates” for the purposes of a written report. Unless otherwise noted, the tables accompanying this report refer to departures that were expected to occur between October 1, 2016 and September 30, 2017.

This report presents the overstay rates to provide a better understanding of those who overstay and remain in the United States beyond their authorized period of admission with no evidence of an extension to their period of admission or adjustment to another immigration status. Rates are provided for the following major categories:

Total Overstay Rate

DHS has determined that there were 52,656,022 in-scope nonimmigrant admissions¹ to the United States through air or sea POEs with expected departures occurring in FY 2017, which represents the majority of air and sea annual nonimmigrant admissions. Of this number, DHS calculated a total overstay rate of 1.33 percent, or 701,900 overstay events. In other words, 98.67 percent of the in-scope nonimmigrant entries departed the United States on time and in accordance with the terms of their admission.

¹ See Appendix A for a full list defining “in-scope nonimmigrant classes of admission.”

This report breaks down the overstay rates further to provide a better picture of those overstays who remain in the United States beyond their period of admission and for whom there is no identifiable evidence of a departure, an extension of period of admission, or transition to another immigration status. At the end of FY 2017, there were 606,926 Suspected In-Country Overstays. The overall Suspected In-Country Overstay rate for this scope of travelers is 1.15 percent of the expected departures.

Due to continuing departures and adjustments of status by individuals in this population, by January 24, 2018 the number of Suspected In-Country Overstays for FY 2017 decreased to 494,710, rendering the Suspected In-Country Overstay rate of 0.94 percent. As of May 1, 2018, the number of Suspected In-Country Overstays for FY 2017 further decreased to 421,325, rendering the Suspected In-Country Overstay rate as 0.80 percent. As of May 1, 2018, DHS has been able to confirm the departures or adjustment of status of more than 99.20 percent of nonimmigrants scheduled to depart in FY 2017 via air and sea POEs.

Visa Waiver Program (VWP) Country Overstay Rate

This report separates Visa Waiver Program (VWP) country overstay figures from non-VWP country figures. For VWP countries, the FY 2017 Suspected In-Country Overstay rate is 0.51 percent of the 22,472,710 expected departures.

Non-Visa Waiver Program Participant Overstay Rate

For non-VWP countries, the FY 2017 Suspected In-Country Overstay rate is 1.91 percent of the 14,659,249 expected departures.

Student or Exchange Visitor Visa Overstay Rate

For nonimmigrants who entered on a student or exchange visitor visa (F, M, or J visa), DHS has determined there were 1,662,369 students and exchange visitors scheduled to complete their program in the United States. However, 4.15 percent stayed beyond the authorized window for departure at the end of their program.²

Canada and Mexico Overstay Rates

Unlike other countries, a majority of travelers from Canada and Mexico enter the United States by land. Figures pertaining to Canada and Mexico are presented separately from the other countries due to the fact that air and sea information represent a smaller portion of the Canadian and Mexican travel population. For Canada, the FY 2017 Suspected In-Country Overstay rate for those traveling through air and sea POEs is 1.01 percent of 9,215,158 expected departures. For Mexico, the FY 2017 Suspected In-Country Overstay rate for those traveling through air and sea POEs is 1.63 percent of 2,916,430

² Excludes Canada and Mexico student or exchange visitors.

expected departures. This represents only travel through air and sea POEs and does not include data on land border crossings.

The FY 2017 report covers the same classes of admission as the FY 2016 DHS Entry and Exit Overstay Report.³ These classes include those traveling to the United States temporarily for business and pleasure, including those from VWP designated countries, traveling under an Electronic System for Travel Authorization (ESTA), student travelers, worker classifications, and other classes of nonimmigrant admission.⁴ These classes of admission account for 97 percent⁵ of all air and sea nonimmigrant admissions to the United States in FY 2017. The only excluded classes are diplomats, crewmembers, aliens in transit, and section 1367 special protected classes (Appendix B).⁶

In FY 2017, DHS expanded its overstay mission capabilities. In addition to further developing a vetting unit responsible for assisting the review of Out-of-Country overstay leads, CBP started a notification process for VWP travelers who overstayed their period of admission in the United States, emailing them regarding their non-compliance and informing them of the ramifications of their violation. In FY 2018, CBP also began notifying VWP travelers in advance of the end date of their period of authorized admission. CBP plans to further expand these notifications to additional populations. Additionally, DHS began requiring VWP countries with an overstay rate equal to or exceeding two percent to implement a public awareness campaign intended to educate their nationals on the importance of abiding by the terms of their admission to the United States.

Overall, total FY 2017 overstay rates are lower than those presented in the previous year's FY 2016 report. Appendix C provides FY 2016 reported figures and updated statistics on total overstay rates from that report year updated through May 1, 2018. At the end of FY 2016, the overall Suspected In-Country Overstay number was 628,799, or 1.25 percent. As of May 1, 2018 the number of Suspected In-Country Overstays had further decreased to 340,377 rendering the FY 2016 Suspected In-Country Overstay rate 0.67 percent. While, at this time, there is no specific cause that can be directly attributed to the decrease in overstay rates between FY report years, it is believed that some contributing factors are: improvements in immigration enforcement, and border security operations, and country specific changes to political, infrastructure, or humanitarian conditions.

DHS continues to improve its data collection of both biographic and biometric data on travelers departing the United States, and these improvements are discussed in this report. DHS will continue to publicly release this report, at a minimum, on an annual basis.

³ U.S. Department of Homeland Security. *Fiscal Year 2016 Entry/Exit Overstay Report* May 2017. Accessible at <https://www.dhs.gov/sites/default/files/publications/Entry%20and%20Exit%20Overstay%20Report%2C%20Fiscal%20Year%202016.pdf>

⁴ See Appendix A

⁵ Appendix B details the 3 percent not accounted for in this report. More than 95 percent of that total are the C or D category (in-transit aliens/airline crewmembers) whose records are difficult to quantify due to the frequency of arrivals and departures close together in time. CBP will continue to improve its ability to report these numbers.

⁶ Section 1367 of title 8, United States Code, establishes rules and penalties for the disclosure of information related to applicants for or beneficiaries of U visas, T visas, or Violence Against Women Act (VAWA) protections.



FY 2017 Entry/Exit Overstay Report

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I. Legislative Language

This document responds to the legislative language set forth in Section 2(a) of the *Immigration and Naturalization Service Data Management Improvement Act of 2000* (Pub. L. No. 106-215) and the FY 2018 Joint Explanatory Statement.

Section 2(a), amending section 110 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, states in relevant part:

“(e) REPORTS —

“(1) In General — Not later than December 31 of each year following the commencement of implementation of the integrated entry and exit data system, the Attorney General shall use the system to prepare an annual report to the Committees on the Judiciary of the House of Representatives and of the Senate.

“(2) Information — Each report shall include the following information with respect to the preceding fiscal year, and an analysis of that information:

(A) The number of aliens for whom departure data was collected during the reporting period, with an accounting by country of nationality of the departing alien.

(B) The number of departing aliens whose departure data was successfully matched to the alien’s arrival data, with an accounting by the alien’s country of nationality and by the alien’s classification as an immigrant or nonimmigrant.

(C) The number of aliens who arrived pursuant to a nonimmigrant visa, or as a visitor under the visa waiver program under section 217 of the Immigration and Nationality Act (8 U.S.C. 1187), for whom no matching departure data have been obtained through the system or through other means as of the end of the alien’s authorized period of stay, with an accounting by the alien’s country of nationality and date of arrival in the United States.

(D) The number of lawfully admitted nonimmigrants identified as having remained in the United States beyond the period authorized by the Attorney General, with an accounting by the alien’s country of nationality.

The FY 2018 Joint Explanatory Statement states:

The Department’s Entry/Exit Overstay Report for fiscal year 2016 revealed that, at the end of that year, there were 628,799 individuals who remained in the United States beyond their authorized period of stay and for whom departure from the United States could not be verified. The Department is directed to develop and report within 180 days of the date of enactment of this Act on a statistically sound metric for measuring the total nonimmigrant air and sea overstay population in the United States at a given time. The report should also describe the

characteristics of suspected in-country overstays and detail how the Department will improve its collection and use of data sets necessary to develop a more comprehensive in-country alien overstay estimate.

II. Background

The purpose of this report is to identify the Fiscal Year (FY) 2017 country-by-country overstay rates for all air and sea in-scope⁷ nonimmigrant classes of admission.

The overstay identification process is conducted utilizing arrival, departure, and immigration benefit information, which is consolidated to generate a complete history for individuals who traveled, and were subsequently admitted, to the United States, as described below.

U.S. Customs and Border Protection (CBP) receives passenger manifests from commercial sea and air carriers and private aircraft for all arrivals to and departures from the United States. These manifests indicate who is aboard the aircraft or vessel. In the land environment, CBP receives travel data on third-country nationals who enter Canada from the United States at a land port of entry.⁸ Additionally, CBP is able to reconcile a significant portion of travelers who enter through our borders with both Canada and Mexico, since the majority of those travelers are frequent border crossers and CBP is able to close a previous arrival when recording a new arrival.

CBP Officers (CBPOs) interview travelers upon arrival at United States ports of entry (POEs) to determine the purpose and intent of travel. CBPOs collect biographic information on all nonimmigrants applying for admission and confirm the accuracy of the biographic manifest data provided by the carriers, which are subject to fines for any missing or inaccurate data. For most foreign nationals, CBP also collects fingerprints and digital photographs⁹ to conduct biometric comparisons against data previously provided to the United States. In addition, CBP strengthened the document requirements at air, land, and sea POEs by requiring all travelers, U.S. citizens and foreign nationals alike, to present a passport or other acceptable document that denotes identity and citizenship when entering the United States.¹⁰

For departing travelers, air and sea carriers provide biographic manifest data for all travelers prior to leaving the United States. Federal regulation requires the carriers to provide specific sets of data, which include name and passport number, and the carriers are subject to fines for missing or inaccurate data. CBP then matches these biographic departure data against arrival data to determine who has complied with the terms of admission and who has overstayed. CBP maintains a separate system specifically for this purpose. This system also receives other Department of Homeland Security (DHS) data relevant to whether a person is lawfully present, such as immigration benefit information or information on student visitors to the United States.

⁷ See Appendix A for a full list defining "In-Scope nonimmigrant classes of admission"

⁸ For the purposes of this paragraph, third country national refers to a person who is not a citizen of Canada or the United States.

⁹ 8 C.F.R. §235.1(f)(1)(ii)

¹⁰ The Western Hemisphere Travel Initiative is a joint U.S. State Department/DHS initiative that implemented §7209 of the Intelligence Reform and Terrorism Prevention Act of 2004 (Pub. L. No. 108-458).

In general, transportation hubs and border infrastructure in the United States were not constructed with exit processing in mind. For example, airports in the United States do not have areas designated exclusively for travelers leaving the United States. Instead, traveler departures are recorded biographically using outbound passenger manifests provided by commercial carriers. Under the Advance Passenger Information System legislation, carriers are required to validate the manifest against the travel document presented by the traveler before he or she is permitted to board his or her aircraft or sea vessel. DHS is also implementing a biometric-based departure program to complement the biographic data collection that already exists.

Travelers arrive at land POEs via various modes of transportation, including cars, trains, buses, bicycles, trucks, and on foot. There are major physical, logistical, and operational obstacles to collecting an individual's biographic and biometric data upon departure. Due to the existing limitations in collecting departure data in the land environment, this report provides limited departure and overstay information for land POEs; when used, it is primarily to match records of individuals arriving by air and sea to those that may have subsequently departed by land to Canada. CBP's ongoing efforts, described in this report, will continue to improve the existing process and availability of departure data.

III. Existing Operations

A. Air and Sea Environments

Today, in the air and sea environments, CBP obtains entry records through both carrier-provided manifest data and inspections conducted by CBPOs. CBP obtains biographic data on travelers who lawfully enter or depart the United States by air or sea.¹¹ Federal regulation requires air and sea carriers to submit passenger manifests to CBP; these are then recorded as arrivals to, or departures from, the United States.¹² Air carriers are required to provide data not solely on who has made a reservation for a particular flight, but who is actually on the aircraft at the time the aircraft departs.¹³ Airlines are subject to fines for making errors regarding who is or is not on any particular aircraft.¹⁴

While CBP currently obtains biographic arrival and departure information on almost all foreign nationals in the air and sea environments, and biometric entry data in the air environment, CBP is committed to continuously improving existing biometric and biographic exit and entry processes. These initial biometric exit processes are providing new opportunities to verify an individual's identity and facilitate collection of new biographic information on individuals where none previously existed. The progress made in both the biometric entry and exit environments is below.

Biometric Air Exit

During FY 2016, CBP began a field test of facial recognition technology for internationally departing air passengers at Atlanta/Hartsfield International airport. Building on the success of that program, CBP has developed a robust cloud-based service which uses facial recognition to match travelers against their photographs contained on their travel documents or from previous arrival processing. Utilizing the air passenger manifest, CBP retrieves traveler photographs from DHS holdings in advance and segregates them into smaller, more manageable data sets. The architecture allows for the real-time biometric exit processing of travelers. As part of this, fingerprint checks are run in the background and concurrently with biographic law enforcement queries. In FY 2017, CBP implemented biometric air exit demonstration projects at eight international airports; from January 1, 2017 to November 30, 2017, over 175,000 travelers and 1,500 flights were processed.

Additionally, CBP has partnered with airports and airlines to implement integrated solutions to collect biometric exit data utilizing front-end capture devices supplied by airports or airlines that are integrated with the biometric solution. In partnership with JetBlue in Boston, CBP has undertaken a paperless boarding project where the face is used to confirm identity of travelers boarding the plane. Additionally, Delta Airlines implemented an auto boarding gate capability at

¹¹ In addition, the Department obtains biometric information on all nonimmigrants who enter the United States via air and sea, except for those who are exempt by regulation, which includes those over the age of 79 or under 14, diplomats, and certain other discrete categories. See 8 C.F.R. §§ 235.1(f)(1)(ii); 235.1(f)(1)(iv).

¹² 8 C.F.R. §231.1, (describing the specific data elements for each passenger that carriers are required to provide).

¹³ 19 C.F.R. §§ 122.49a; 122.75a.

¹⁴ 8 U.S.C. § 1221(g).

John F. Kennedy International Airport using CBP's matching service. In FY 2017 CBP continued to expand integrated biometric exit projects with airports and airlines, and is moving to a seamless biometric exit collection process. As a result of the pilot programs described above, CBP believes that facial recognition technology at the airline departure gate is a scalable solution for biometric exit in the air environment. Furthermore, the biometric match allows CBP to ensure the accuracy of the biographic data provided by air and sea carriers used to conduct law enforcement and national security based queries. It also mitigates the possibility of an imposter using a legitimate document.

B. Land Environment

The collection of departure information in the land environment is more difficult than in the air and sea environments due to the major physical, logistical, and operational obstacles involved with electronically collecting an individual's biographic and biometric data. Additionally, in the land environment, it is not feasible to obtain advance reporting of arrivals and departures, as the majority of travelers cross the borders using their own vehicle or as a pedestrian.

1. Northern Border

On the Northern border, CBP is addressing this limitation through a partnership with the Canada Border Services Agency. The 2011 U.S.-Canada Beyond the Border declaration and action plan,¹⁵ included an entry and exit initiative under which Canada and the United States have agreed to exchange biographic entry records for land crossings between the two countries, so that an entry into one is recorded as an exit from the other.

On June 30, 2013, Canada and the United States began exchanging biographic entry data for third-country nationals (including permanent residents of Canada and United States lawful permanent residents) who enter through land POEs along the shared border where information is collected electronically. Because of this initiative, the United States now has a working biographic land border exit system on its Northern border for non-Canadian citizens (and legislation is underway in Canada to include Canadian citizen data in the future).

CBP currently matches 98.6 percent of the entry information received from Canada to an entry in the Arrival and Departure Information System (ADIS). To date, this data-sharing agreement has led to 19.6 million departure records. CBP uses this information to resolve previous traveler air or sea arrivals into the United States for those cases where the traveler may then subsequently depart by land to Canada.

2. Southern Border

On the southern border, CBP conducts outbound pulse and surge operations as part of its law enforcement mission. These operations are ongoing and provide some outbound departure

¹⁵United States-Canada Beyond the Border: A Shared Vision for Perimeter Security and Economic Competitiveness. Action Plan, Dec. 2011. Accessible at <https://obamawhitehouse.archives.gov/the-press-office/2011/02/04/declaration-president-obama-and-prime-minister-harper-canada-beyond-bord>

information on travelers departing the United States and entering Mexico. Southern Border exits include both vehicle and pedestrian.

Vehicle

In FY 2017, CBP expanded on the successful FY 2016 Otay Border crossing experiment by utilizing Biometric Exit Mobile (BE-Mobile) devices during pulse and surge operations. BE-Mobile devices were used at three port locations along the southern border in 2017, providing CBP officers with the ability to capture the fingerprints of third country nationals departing the United States via the southern border. CBP plans to expand BE-Mobile use at land borders nationwide in FY 2018.

Pedestrian

In FY 2017, CBP began planning for a pilot at the Ports of Nogales and San Luis that will demonstrate the feasibility of acquiring photos of all arriving and departing travelers on the southern border and comparing those photos using facial recognition algorithms to photos on file in government holdings. The pilot is expected to go live in late FY 2018.

In addition, CBP is partnering with the Mexican National Institute of Migration (INM) to share information on Mexican citizens entering Mexico, and thus departing the United States, at the San Ysidro port of entry. The program is using radio frequency identification (RFID) which is included on many forms of documentation typically carried by Mexican nationals who travel to the United States. The data collected on the Mexican side of the border is sent to the United States to confirm a departure. This program began in December 2017.

C. Overstay Definition

An overstay is a nonimmigrant who was lawfully admitted to the United States for an authorized period but stayed in the United States beyond his or her authorized admission period.

Nonimmigrants admitted for “duration of status” who fail to maintain their status also may be considered overstays. “Duration of status” is a term used for foreign nationals who are admitted for the duration of a specific program or activity, which may be variable, instead of for a set timeframe.¹⁶ The authorized admission period ends when the foreign national has accomplished the purpose or is no longer engaged in authorized activities pertaining to that purpose. An example is a student program that runs for four years. When the program is completed, the student must leave or go on to pursue another program of study.

DHS classifies individuals as overstays by using the ADIS system to match departure and status change records to arrival records collected during the admission process. DHS further identifies nonimmigrant status through manual vetting processes to support possible enforcement action. DHS identifies an individual as having overstayed if his or her departure record shows he or she departed the United States after his or her authorized admission period expired¹⁷ (i.e., Out-of-

¹⁶ For example, “duration of status” for F nonimmigrants is defined as “the time during which an F-1 student is pursuing a full course of study at an [approved] educational institution . . . or engaging in authorized practical training following completion of studies, . . .” 8 C.F.R. 214.2(f)(5)(i).

¹⁷ In these cases, DHS sanctions the individual who overstayed the authorized period of stay in the United States according to immigration law, which is based on a sliding scale of penalties depending on the length of time unlawfully present in the United States. See, e.g., 8 U.S.C. § 1202(g) (nonimmigrant visa is voided at conclusion of authorized period of stay, if an individual remains in the United States beyond the

Country Overstays). While these individuals are considered overstays, there is evidence indicating they are no longer physically present in the United States. DHS also identifies individuals as possible overstays if there are no records of a departure or change in status prior to the end of their authorized admission period (i.e., Suspected In-Country Overstays).¹⁸

In this report, DHS presents ADIS-generated overstay rates by country of citizenship for nonimmigrant visitors who were admitted to the United States through an air or sea POE, regardless of overstay type.¹⁹ The ADIS-generated overstay rates produced for this report depict a snapshot of statistics reflecting the date the data was pulled for analysis. The reported classes of admission account for 97 percent of the total number of admissions by nonimmigrants who arrived by air or sea in FY 2017. While significant progress has been made, challenges remain with the integration of systems used in the travel continuum for reporting on classes of admission associated with land entry. It is anticipated these challenges will be mitigated in the future through improvements in land data collection for individuals exiting the United States and improvements in data exchanges with Canada and Mexico.

The following nonimmigrant classes of admission are not included in the report due to unspecified authorized periods of stay and legal protections: diplomats and other representatives, crewmembers, aliens in transit, and Section 1367 special-protected classes (Appendix B).

D. Overstay Identification and Action

CBP maintains arrival and departure information for all foreign nationals based on border crossings and carrier data. This information is used to generate daily overstay lists by the ADIS system. These system-generated overstay lists are sent for checks against the CBP Automated Targeting System-Passenger (ATS-P) and the USCIS Computer Linked Application Information Management System 3 (CLAIMS3) database, reducing the overall list size by identifying persons who have departed the United States or adjusted their status to another nonimmigrant or immigrant category. For Suspected In-Country Overstays, the ATS-P then applies screening rules, as defined by U.S. Immigration and Customs Enforcement (ICE), to determine the level of priority for each system-identified overstay.

As part of the overstay enforcement mission, DHS operational units further vet these system-identified Suspected In-Country and Out-of-Country Overstay leads. The In-Country Overstay

authorized period); 8 U.S.C. § 1187(a)(7) (referring to the VWP, "if the alien previously was admitted without a visa under this section, the alien must not have failed to comply with the conditions of any previous admission as such a nonimmigrant"); and 8 U.S.C. § 1182(a)(9)(B)(i)(I) and (II) (alien inadmissible for 3 years if unlawfully present for more than 180 days but less than a year; alien inadmissible for 10 years if unlawfully present for a year or more, pursuant to various provisions of the Immigration and Nationality Act).

¹⁸ Pending immigration benefit applications and approved extensions of stay, change of nonimmigrant status, or adjustment of status to lawful permanent resident may extend or modify the authorized period of stay. For example, upon entering the United States a person may be granted a six-month period of admission, but thereafter lawfully change immigration status prior to the expiration of that period, and in turn be authorized to stay beyond the initial six months. These options are not available to all categories of aliens. See 8 U.S.C. 1258, 8 C.F.R. 248.2. For example, those who enter under the VWP are generally not eligible to change or extend their nonimmigrant status. 8 C.F.R. § 245.1(b)(8); 8 C.F.R. § 248.2(a)(6).

¹⁹ The sea overstay rates are only reflective of the population that initially entered the United States through a sea POE but is not reflective of all traveler arrivals where the vessel both departs from and subsequently arrives at the same location (commonly referred to as "closed loop" cruises.) For example, if a foreign national already within the United States departs from the Port Canaveral, Florida Seaport for a seven-day cruise in the Caribbean and subsequently re-enters at Port Canaveral, then that arrival would not be taken into account for the purposes of this report.

leads are worked by ICE. ICE's Homeland Security Investigations (HSI) Counterterrorism and Criminal Exploitation Unit (CTCEU) is a national program dedicated to the investigation of nonimmigrant violations that pose a national security or public safety concern. Each year, CTCEU analyzes records of over one million potential status violators from various investigative databases and DHS entry/exit registration systems. To better manage investigative resources, CTCEU relies on a prioritization framework for these leads established in consultation with interagency partners within the national intelligence and federal law enforcement communities. Those identified as posing a potential national security or public safety concern are prioritized and referred to HSI field offices for investigation. Where nonimmigrant violators are identified but do not meet CTCEU's criteria for investigation, HSI refers the case to ICE's Enforcement and Removal Operations (ERO) National Criminal Analysis and Targeting Center (NCATC) which works in close coordination with CTCEU for further vetting. If the lead is credible and justifies further investigation, it is then forwarded to the respective ICE ERO field office for enforcement action.

ICE HSI Special Agents and analysts continuously monitor threat reports and proactively address emergent issues. This practice has contributed to ICE HSI's counterterrorism mission by managing and supporting high-priority national security initiatives based on specific intelligence from intra- and inter-agency partners. The goal is to identify, locate, and where applicable, prosecute and remove those overstays posing current or potential national security and public safety concerns to the United States. ICE HSI accomplishes its mission by conducting specialized research and analysis, executing targeted operations and special initiatives, and leveraging ICE's expertise with partnering agencies. As part of the overstay enforcement mission, ICE focuses its investigations on those subjects who are considered to pose a concern to national security or public safety. CTCEU's capabilities are enhanced by the use of the National Counterterrorism Center (NCTC) resources to screen overstays by identifying potential matches to derogatory intelligence community holdings.

In June 2016, CBP established an operation unit to review and vet Out-of-Country overstays. The ADIS Vetting Unit (AVU) receives new Out-of-Country Overstay leads for analysts to review on a daily basis. The first step an analyst takes is to ensure that the traveler's person-centric identity is correct in both ADIS and the Automated Biometric Identification System (IDENT). Once the identity has been validated, the analyst queries multiple information systems containing travel and immigration data. These exhaustive searches are designed to find any relevant data not present in ADIS in order to ensure confidence is high that the overstay lead is valid. If these reviews confirm the traveler has overstayed, that traveler may lose the ability to participate in the VWP program, may have their nonimmigrant visa no longer recognized by CBP as valid, and/or may have a three or ten-year bar placed on any subsequent reentry. To date, the work of the AVU has resulted in over 13,000 actions taken of this kind.

Furthermore, in May 2017, CBP began notifying VWP travelers that were in violation of their overstay status via email and via access to the CBP public website providing I-94 data and other immigration data.²⁰ As part of this effort, the public I-94 website was updated to provide VWP travelers with a portal where they can look up their "admitted until date" for those travelers

²⁰ "Official Site for Travelers Visiting the United States: Apply for or Retrieve Form I-94, Request Travel History and Check Travel Compliance." Accessible at <https://i94.cbp.dhs.gov/>

receiving emails indicating they had overstayed. In January 2018, CBP also began notifying VWP travelers in advance of the end date of their period of authorized admission. CBP plans to further expand these notifications to additional populations.

To date, over a thousand notifications have occurred. The goal is to improve traveler awareness, especially as it pertains to the length of admitted time to the United States. CBP expects these proactive communications and improvements will provide tools for travelers to be more cognizant of their immigration status, especially as it pertains to their period of admission while in the United States. The program is expanding to include notifications to travelers nearing their expected time of departure, as well as notifications to additional traveler populations outside of the VWP program when an overstay violation occurs.

As reflected in Table 1 travelers from VWP countries are less likely to overstay compared to visitors from non-VWP countries. However, in accordance with the high standards required for a country to join and remain in the VWP, DHS introduced a new program enhancement designed to reduce overstays even further. Starting in December 2017, VWP countries with a business or tourism nonimmigrant visitors overstay rate of two percent or greater are required to initiate a public information campaign to reduce overstay violations by educating their nationals on the conditions for admission into the United States. Based on the statistics in the FY 2016 Exit/Entry Overstay Report, DHS informed four affected VWP countries (i.e., Greece, Hungary, Portugal, and San Marino) of the need to develop a campaign and began engaging with their nationals. As of the date of the publication of this report, only Hungary and Portugal exceeded the two percent threshold.

IV. Overstay Rates

Tables 1 – 6 represent country-by-country overstay rates from FY 2017. For this report, the term, “in-scope”, includes the following categories of nonimmigrant admissions: temporary workers and families (temporary workers and trainees, intracompany transferees, treaty traders and investors), students, exchange visitors, temporary visitors for pleasure, temporary visitors for business, and other nonimmigrant classes of admission.²¹ This report calculates overstays by entry rather than by individual. For example, if a traveler with a multiple entry visa enters multiple times during the reporting period and overstays more than once during this time, each time the traveler remains longer than the authorized period of admission is counted in this report as a separate overstay.

In Tables 1–6, the term “Expected Departures” represents the entries by travelers from each country who were lawfully admitted to the United States as a nonimmigrant and whose authorized period of admission expired within FY 2017. The “Total Number of Overstays” for each country equals the summation of both the Out-of-Country and Suspected In-Country Overstays (based on number of overstay entries) for a specific country. The “Overstay Rate” is the percentage of entries by travelers from each country who overstayed their authorized period of admission to the United States, regardless of type.²² This rate is the percentage of the Total Number of Overstays compared with the current fiscal year’s Expected Departures.

DHS identified 52,656,022 in-scope nonimmigrants who were expected to depart the United States via air or sea in FY 2017. The FY 2017 nonimmigrant travel data identified a Suspected In-Country Overstay rate of 1.15 percent (606,926), and a total overstay rate of 1.33 percent (701,900) out of the overall expected departures of in-scope travelers in FY 2017.

Temporary Visitors for Business and Pleasure (Tables 2, 3, and 6)

Tables 2 and 3 present the overstay rates for temporary visitors for business and pleasure. The overstay rates for temporary visitors for business and pleasure traveling under the VWP or on a B1 or B2 visa are identified in Table 2. Similarly, Table 3 identifies the overstay rates for temporary visitors for business and pleasure admitted to the United States under B1 or B2 classes of admission for non-VWP countries excluding Canada and Mexico. The B1 and B2 overstay rates for Canada and Mexico (Table 6) are separate due to the high percentage of land travelers who are admitted to the United States relative to the other countries. It is important to note that the total number of overstays, as identified in this report, does not equal the total number of overstays who currently remain in the United States during this reporting period. That number is lower because foreign nationals identified as possible overstays can subsequently depart the United States, or adjust their lawful status. For purposes of this report, these are still considered overstays.

²¹ See Appendix A for a full list of “In-Scope nonimmigrant classes of admission”

²² Rates are shown for countries as well as passport-issuing authorities and places of origin recognized by the United States. With respect to all references to “country” or “countries” in this document, Section 4(b)(1) of the Taiwan Relations Act of 1979 (Pub. L. No. 96-8) provides that “[w]henver the laws of the United States refer or relate to foreign countries, nations, states, governments, or similar entities, such terms shall include and such laws shall apply with respect to Taiwan.” 22 U.S.C. § 3303(b)(1). Accordingly, references to “country” or “countries” in the VWP authorizing legislation, Section 217 of the Immigration and Nationality Act (8 U.S.C. § 1187), are read to include Taiwan. Taiwan entered the VWP on October 2, 2012.

VWP Countries Business or Pleasure Visitors Air and Sea Overstay Rate Summary

In FY 2017, DHS calculated 22,472,710 B1/B2/Waiver-Business (WB)/Waiver-Tourist (WT) expected departures for VWP countries. The FY 2017 VWP countries' total overstay rate is 0.58 percent of the VWP countries expected departures, and the Suspected In-Country Overstay rate is 0.51 percent of the VWP countries expected departures. DHS is in the process of determining how the data presented in this report is best used to make decisions regarding the continued designation of countries in the VWP.

Non-VWP Countries Business or Pleasure Visitors Air and Sea Overstay Rate Summary (excluding Canada and Mexico)

For the FY 2017 non-VWP countries, DHS calculated 14,659,249 expected departures. The FY 2017 non-VWP total overstay rate is 2.06 percent of the non-VWP expected departures, and the Suspected In-Country Overstay rate is 1.91 percent of the non-VWP expected departures.

Student and Exchange Visitors

For the purposes of this Report, the term "Expected Departures" located in Table 4 refers to a date identified in the Student and Exchange Visitor System (SEVIS) based on the authorized program or employment status of an F or M student or J exchange visitor.²³ The system-generated overstay leads are generated by ADIS matching information against SEVIS data. One current challenge in this process, however, is that ADIS is a person-centric data, but, SEVIS data is document-centric, meaning the system tracks a unique SEVIS identification number associated with each Form I-20 issued. In a person-centric environment an individual is either active or inactive but in a document-centric environment a person could have multiple active records, making it difficult to determine if a person is in valid status. To address this issue, SEVIS is currently undergoing a modernization process to become a person-centric system, which will greatly enhance the automated matching capabilities between ADIS and SEVIS when generating automated overstay lists.

In FY 2017, DHS calculated a total of 1,662,369 students and exchange visitors who were expected to change status or depart the United States.²⁴ The 1,662,369 is composed of 1,171,744 F, 15,545 M, and 475,080 J visa categories of admission. The F, M, and J Suspected In-Country Overstay rate is 2.35 percent of the total number of students and exchange visitors who were expected to change status or depart the United States. The Suspected In-Country Overstay rate is 2.25 percent for the F visa category, 2.36 percent for the M visa category and 2.59 percent for J visa category. The total overstay rate (*i.e.*, both Suspected In-Country and Out-of-Country Overstays) for students and exchange visitors in FY 2017 is 4.15 percent of the total number of students and exchange visitors who were expected to have changed status or departed from the United States in FY 2017. The total overstay rate is 4.07 percent for the F visa category, 9.54 percent for the M visa category, and 4.17 percent for the J visa category.

²³ "F" includes (F1/F2), "M" includes (M1/M2), "J" includes (J1/J2) classes of admission

²⁴ This figure does not include the F/M/J classes of admission for those visitors with a Mexican or Canadian Country of citizenship; those figures are included in table 4. With the inclusion of Canada and Mexico, the F/M/J total is 1,771,375 (1,251,241 F; 16,982 M; and 503,152 J)

Overstay Duration Highlights

This year's report includes a new section on examining overstay durations. A significant number of overstays depart the United States a short time after the overstay has occurred. Table 7 displays the number of late departures among Out-of-Country overstays that occurred within a 60-day time window following the overstay, broken down by 10 day intervals within this period. Corrective actions taken when an overstay is confirmed varies with the overstay duration.

This section also presents overstay rates by major class of admission, as reported at the end of FY 2017 and FY 2016 reporting periods, followed by those rates by major class of admission near the time of the publication of this report.

A. Overstay Rate Summary

The table below provides a high-level summary of the country-by-country data identified in Tables 2 through 6.

Table 1 FY 2017 Summary Overstay rates for Nonimmigrants admitted to the United States via air and sea POEs						
Admission Type	Expected Departures	Out-of-Country Overstays	Suspected In-Country Overstays	Total Overstays	Total Overstay Rate	Suspected In-Country Overstay Rate
<i>VWP Countries Business or Pleasure Visitors^{25,26} (Table 2)</i>	22,472,710	16,944	114,121	131,065	0.58%	0.51%
<i>Non-VWP Countries Business or Pleasure Visitors (excluding Canada and Mexico) (Table 3)</i>	14,659,249	21,157	280,559	301,716	2.06%	1.91%
<i>Student and Exchange Visitors (excluding Canada and Mexico) (Table 4)</i>	1,662,369	29,909	39,074	68,983	4.15%	2.35%
<i>All Other In-Scope Nonimmigrants²⁷ (excluding Canada and Mexico) (Table 5)</i>	1,730,106	13,119	32,877	45,996	2.66%	1.90%
<i>Canada and Mexico Nonimmigrants (Table 6)</i>	12,131,588	13,845	140,295	154,140	1.27%	1.16%
TOTAL	52,656,022	94,974	606,926	701,900	1.33%	1.15%

²⁵ Upon admission into the United States, visitors classified under either a WT (waiver-tourist) or a WB (waiver-business) status.

²⁶ Citizens or nationals of VWP countries may also obtain and travel to the United States on a B1/B2 visa and seek admission under the B1 or B2 nonimmigrant classification.

²⁷ See Appendix A for a complete list of "In-Scope nonimmigrant classes of admission"

B. VWP Nonimmigrant Business or Pleasure Overstay Rates

Table 2
FY 2017 Overstay rates for nonimmigrant visitors admitted to the United States for business or pleasure (WB/WT/B-1/B-2) via air and sea POEs for VWP Countries

Country of Citizenship	Expected Departures	Out-of-Country Overstays	Suspected In-Country Overstays	Total Overstays	Total Overstay Rate	Suspected In-Country Overstay Rate
<i>Andorra</i>	1,372	1	5	6	0.44%	0.36%
<i>Australia</i> ²⁸	1,396,537	798	4,581	5,379	0.39%	0.33%
<i>Austria</i>	216,019	72	820	892	0.41%	0.38%
<i>Belgium</i>	289,018	160	1,434	1,594	0.55%	0.50%
<i>Brunei</i>	1,083	2	12	14	1.29%	1.11%
<i>Chile</i>	395,969	777	4,494	5,271	1.33%	1.13%
<i>Czech Republic</i>	113,815	190	723	913	0.80%	0.64%
<i>Denmark</i> ²⁹	344,024	137	1,233	1,370	0.40%	0.36%
<i>Estonia</i>	25,624	50	135	185	0.72%	0.53%
<i>Finland</i>	159,363	83	642	725	0.45%	0.40%
<i>France</i> ³⁰	1,808,952	2,050	14,406	16,456	0.91%	0.80%
<i>Germany</i>	2,150,807	1,088	9,952	11,040	0.51%	0.46%
<i>Greece</i>	82,849	384	1,032	1,416	1.71%	1.25%
<i>Hungary</i>	89,938	442	1,391	1,833	2.04%	1.55%
<i>Iceland</i>	63,527	36	172	208	0.33%	0.27%
<i>Ireland</i>	511,911	273	2,275	2,548	0.50%	0.44%
<i>Italy</i>	1,248,411	1,294	9,043	10,337	0.83%	0.72%
<i>Japan</i>	3,115,068	447	6,376	6,823	0.22%	0.20%
<i>Korea, South</i>	1,451,882	1,117	4,326	5,443	0.37%	0.30%
<i>Latvia</i>	22,589	91	212	303	1.34%	0.94%
<i>Liechtenstein</i>	1,984	-	12	12	0.60%	0.60%
<i>Lithuania</i>	35,555	115	396	511	1.44%	1.11%
<i>Luxembourg</i>	13,726	8	62	70	0.51%	0.45%
<i>Malta</i>	6,559	3	36	39	0.59%	0.55%
<i>Monaco</i>	1,070	-	2	2	0.19%	0.19%
<i>Netherlands</i> ³¹	756,667	464	3,565	4,029	0.53%	0.47%
<i>New Zealand</i> ³²	345,874	439	1,353	1,792	0.52%	0.39%
<i>Norway</i>	288,297	130	773	903	0.31%	0.27%
<i>Portugal</i>	179,534	496	3,242	3,738	2.08%	1.81%
<i>San Marino</i>	720	1	2	3	0.42%	0.28%
<i>Singapore</i>	130,590	84	301	385	0.29%	0.23%

²⁸ Australia includes Australia, Norfolk Island, Christmas Island, and Cocos (Keeling) Island.

²⁹ Denmark includes Denmark, Faroe Islands, and Greenland.

³⁰ France includes France, French Guiana, French Polynesia, French Southern and Antarctic Lands, Guadeloupe, Martinique, Mayotte, New Caledonia, Reunion, Saint Barthelemy, Saint Pierre and Miquelon, and Wallis and Futuna.

³¹ Netherlands includes the Netherlands, Aruba, Bonaire, Curacao, Saba, Sint Eustatius, and Sint Maarten.

³² New Zealand includes New Zealand, Cook Islands, Tokelau, and Niue.

Table 2

FY 2017 Overstay rates for nonimmigrant visitors admitted to the United States for business or pleasure (WB/WT/B-1/B-2) via air and sea POEs for VWP Countries

Country of Citizenship	Expected Departures	Out-of-Country Overstays	Suspected In-Country Overstays	Total Overstays	Total Overstay Rate	Suspected In-Country Overstay Rate
<i>Slovakia</i>	50,339	112	429	541	1.07%	0.85%
<i>Slovenia</i>	25,734	35	118	153	0.59%	0.46%
<i>Spain</i>	999,556	1,930	11,850	13,780	1.38%	1.19%
<i>Sweden</i>	573,731	312	2,234	2,546	0.44%	0.39%
<i>Switzerland</i>	429,380	214	1,476	1,690	0.39%	0.34%
<i>Taiwan</i>	406,944	646	1,775	2,421	0.59%	0.44%
<i>United Kingdom</i> ³³	4,737,692	2,463	23,231	25,694	0.54%	0.49%
TOTAL	22,472,710	16,944	114,121	131,065	0.58%	0.51%

³³ United Kingdom includes the United Kingdom, Anguilla, Bermuda, British Virgin Islands, Cayman Islands, Falkland Islands, Gibraltar, Guernsey, Isle of Man, Jersey, Montserrat, Pitcairn Islands, Saint Helena, and Turks and Caicos Islands.

C. Non-VWP Country B1/B2 Overstay Rates

Table 3

FY 2017 Overstay rates for nonimmigrants admitted to the United States for business or pleasure via air and sea POEs for non-VWP Countries (excluding Canada and Mexico)

Country Of Citizenship	Expected Departures	Out-of-Country Overstays	Suspected In-Country Overstays	Total Overstays	Total Overstay Rate	Suspected In-Country Overstay Rate
<i>Afghanistan</i>	1,686	7	170	177	10.50%	10.08%
<i>Albania</i>	11,453	52	384	436	3.81%	3.35%
<i>Algeria</i>	11,383	29	374	403	3.54%	3.29%
<i>Angola</i>	6,926	13	684	697	10.06%	9.88%
<i>Antigua and Barbuda</i>	15,877	28	205	233	1.47%	1.29%
<i>Argentina</i>	1,008,194	261	6,574	6,835	0.68%	0.65%
<i>Armenia</i>	10,183	19	503	522	5.13%	4.94%
<i>Azerbaijan</i>	6,585	20	430	450	6.83%	6.53%
<i>Bahamas, The</i>	263,417	440	3,320	3,760	1.43%	1.26%
<i>Bahrain</i>	7,573	9	58	67	0.88%	0.77%
<i>Bangladesh</i>	28,739	54	759	813	2.83%	2.64%
<i>Barbados</i>	67,575	56	2,621	2,677	3.96%	3.88%
<i>Belarus</i>	17,795	51	734	785	4.41%	4.12%
<i>Belize</i>	27,934	44	595	639	2.29%	2.13%
<i>Benin</i>	2,149	13	104	117	5.44%	4.84%
<i>Bhutan</i>	373	2	51	53	14.21%	13.67%
<i>Bolivia</i>	70,117	109	1,250	1,359	1.94%	1.78%
<i>Bosnia and Herzegovina</i>	7,948	39	86	125	1.57%	1.08%
<i>Botswana</i>	2,001	1	26	27	1.35%	1.30%
<i>Brazil</i>	1,806,670	1,847	31,912	33,759	1.87%	1.77%
<i>Bulgaria</i>	29,493	82	302	384	1.30%	1.02%
<i>Burkina Faso</i>	4,762	22	669	691	14.51%	14.05%
<i>Burma</i>	6,778	24	304	328	4.84%	4.49%
<i>Burundi</i>	1,360	7	171	178	13.09%	12.57%
<i>Cabo Verde</i>	5,060	30	661	691	13.66%	13.06%
<i>Cambodia</i>	3,803	14	144	158	4.15%	3.79%
<i>Cameroon</i>	10,676	123	923	1,046	9.80%	8.65%
<i>Central African Republic</i>	179	-	16	16	8.94%	8.94%
<i>Chad</i>	611	9	140	149	24.39%	22.91%
<i>China</i> ³⁴	2,378,260	2,537	16,225	18,762	0.79%	0.68%
<i>Colombia</i>	869,932	1,078	21,070	22,148	2.55%	2.42%
<i>Comoros</i>	96	-	2	2	2.08%	2.08%
<i>Congo (Brazzaville)</i> ³⁵	1,106	6	78	84	7.59%	7.05%
<i>Congo (Kinshasa)</i> ³⁶	6,327	36	507	543	8.58%	8.01%
<i>Costa Rica</i>	305,746	170	2,940	3,110	1.02%	0.96%
<i>Croatia</i>	23,677	25	177	202	0.85%	0.75%

³⁴ China includes the People's Republic of China, Hong Kong, and Macau.

³⁵ Congo (Brazzaville) refers to the Republic of the Congo.

³⁶ Congo (Kinshasa) refers to the Democratic Republic of the Congo.

Table 3

FY 2017 Overstay rates for nonimmigrants admitted to the United States for business or pleasure via air and sea POEs for non-VWP Countries (excluding Canada and Mexico)

Country Of Citizenship	Expected Departures	Out-of-Country Overstays	Suspected In-Country Overstays	Total Overstays	Total Overstay Rate	Suspected In-Country Overstay Rate
<i>Cuba</i>	56,922	203	1,423	1,626	2.86%	2.50%
<i>Cyprus</i>	9,699	6	61	67	0.69%	0.63%
<i>Côte d'Ivoire</i>	6,671	26	310	336	5.04%	4.65%
<i>Djibouti</i>	1,000	7	416	423	42.30%	41.60%
<i>Dominica</i>	7,513	18	285	303	4.03%	3.79%
<i>Dominican Republic</i>	394,370	386	10,963	11,349	2.88%	2.78%
<i>Ecuador</i>	411,441	458	8,529	8,987	2.18%	2.07%
<i>Egypt</i>	82,255	163	1,770	1,933	2.35%	2.15%
<i>El Salvador</i>	194,627	238	4,748	4,986	2.56%	2.44%
<i>Equatorial Guinea</i>	954	9	43	52	5.45%	4.51%
<i>Eritrea</i>	3,172	85	757	842	26.54%	23.87%
<i>Ethiopia</i>	19,597	128	851	979	5.00%	4.34%
<i>Fiji</i>	9,058	32	295	327	3.61%	3.26%
<i>Gabon</i>	1,961	16	117	133	6.78%	5.97%
<i>Gambia, The</i>	1,748	30	186	216	12.36%	10.64%
<i>Georgia</i>	6,362	16	587	603	9.48%	9.23%
<i>Ghana</i>	22,785	74	810	884	3.88%	3.55%
<i>Grenada</i>	10,843	21	240	261	2.41%	2.21%
<i>Guatemala</i>	273,374	315	6,280	6,595	2.41%	2.30%
<i>Guinea</i>	3,118	36	242	278	8.92%	7.76%
<i>Guinea-Bissau</i>	153	-	12	12	7.84%	7.84%
<i>Guyana</i>	68,760	96	2,166	2,262	3.29%	3.15%
<i>Haiti</i>	154,385	745	9,813	10,558	6.84%	6.36%
<i>Holy See</i>	10	-	-	-	-	-
<i>Honduras</i>	203,446	261	4,840	5,101	2.51%	2.38%
<i>India</i>	1,078,809	1,708	12,498	14,206	1.32%	1.16%
<i>Indonesia</i>	90,389	105	1,033	1,138	1.26%	1.14%
<i>Iran</i>	17,506	94	540	634	3.62%	3.08%
<i>Iraq</i>	10,270	77	941	1,018	9.91%	9.16%
<i>Israel</i>	419,356	376	3,673	4,049	0.97%	0.88%
<i>Jamaica</i>	302,025	381	9,172	9,553	3.16%	3.04%
<i>Jordan</i>	39,461	230	1,763	1,993	5.05%	4.47%
<i>Kazakhstan</i>	19,340	54	649	703	3.63%	3.36%
<i>Kenya</i>	23,016	102	1,036	1,138	4.94%	4.50%
<i>Kiribati</i>	177	-	2	2	1.13%	1.13%
<i>Korea, North</i> ³⁷	25	-	-	-	-	-
<i>Kuwait</i>	48,195	245	602	847	1.76%	1.25%
<i>Kyrgyzstan</i>	3,022	5	118	123	4.07%	3.90%
<i>Laos</i>	1,587	5	174	179	11.28%	10.96%
<i>Lebanon</i>	39,603	74	744	818	2.07%	1.88%

³⁷ North Korea refers to the Democratic People's Republic of Korea.

Table 3

FY 2017 Overstay rates for nonimmigrants admitted to the United States for business or pleasure via air and sea POEs for non-VWP Countries (excluding Canada and Mexico)

Country Of Citizenship	Expected Departures	Out-of-Country Overstays	Suspected In-Country Overstays	Total Overstays	Total Overstay Rate	Suspected In-Country Overstay Rate
<i>Lesotho</i>	337	-	3	3	0.89%	0.89%
<i>Liberia</i>	4,136	75	783	858	20.74%	18.93%
<i>Libya</i>	1,036	5	60	65	6.27%	5.79%
<i>Macedonia</i>	7,459	27	113	140	1.88%	1.51%
<i>Madagascar</i>	1,078	2	15	17	1.58%	1.39%
<i>Malawi</i>	2,188	10	144	154	7.04%	6.58%
<i>Malaysia</i>	77,687	75	1,023	1,098	1.41%	1.32%
<i>Maldives</i>	342	1	7	8	2.34%	2.05%
<i>Mali</i>	3,372	20	173	193	5.72%	5.13%
<i>Marshall Islands</i>	71	-	1	1	1.41%	1.41%
<i>Mauritania</i>	1,183	21	125	146	12.34%	10.57%
<i>Mauritius</i>	3,334	4	20	24	0.72%	0.60%
<i>Micronesia, Federated States of</i>	50	1	2	3	6.00%	4.00%
<i>Moldova</i>	9,587	24	415	439	4.58%	4.33%
<i>Mongolia</i>	10,980	52	682	734	6.68%	6.21%
<i>Montenegro</i>	5,165	12	232	244	4.72%	4.49%
<i>Morocco</i> ³⁸	28,890	99	459	558	1.93%	1.59%
<i>Mozambique</i>	1,797	6	57	63	3.51%	3.17%
<i>Namibia</i>	1,766	7	10	17	0.96%	0.57%
<i>Nauru</i>	65	-	5	5	7.69%	7.69%
<i>Nepal</i>	24,240	114	450	564	2.33%	1.86%
<i>Nicaragua</i>	69,098	101	1,358	1,459	2.11%	1.97%
<i>Niger</i>	1,052	10	58	68	6.46%	5.51%
<i>Nigeria</i>	185,375	630	19,046	19,676	10.61%	10.27%
<i>Oman</i>	4,494	7	34	41	0.91%	0.76%
<i>Pakistan</i>	96,677	224	2,070	2,294	2.37%	2.14%
<i>Palau</i>	33	-	2	2	6.06%	6.06%
<i>Panama</i>	153,534	121	985	1,106	0.72%	0.64%
<i>Papua New Guinea</i>	631	4	11	15	2.38%	1.74%
<i>Paraguay</i>	28,929	34	524	558	1.93%	1.81%
<i>Peru</i>	308,891	358	4,687	5,045	1.63%	1.52%
<i>Philippines</i>	293,000	561	4,715	5,276	1.80%	1.61%
<i>Poland</i>	190,168	243	2,221	2,464	1.30%	1.17%
<i>Qatar</i>	14,279	47	149	196	1.37%	1.04%
<i>Romania</i>	73,692	176	879	1,055	1.43%	1.19%
<i>Russia</i>	275,751	353	3,837	4,190	1.52%	1.39%
<i>Rwanda</i>	3,513	11	135	146	4.16%	3.84%
<i>Saint Kitts and Nevis</i>	12,143	17	247	264	2.17%	2.03%
<i>Saint Lucia</i>	16,310	33	326	359	2.20%	2.00%

³⁸ Morocco includes Morocco and Western Sahara.

Table 3

FY 2017 Overstay rates for nonimmigrants admitted to the United States for business or pleasure via air and sea POEs for non-VWP Countries (excluding Canada and Mexico)

Country Of Citizenship	Expected Departures	Out-of-Country Overstays	Suspected In-Country Overstays	Total Overstays	Total Overstay Rate	Suspected In-Country Overstay Rate
<i>Saint Vincent and the Grenadines</i>	9,470	22	324	346	3.65%	3.42%
<i>Samoa</i>	2,224	24	132	156	7.01%	5.94%
<i>Sao Tome and Principe</i>	39	-	1	1	2.56%	2.56%
<i>Saudi Arabia</i>	132,123	438	1,005	1,443	1.09%	0.76%
<i>Senegal</i>	8,432	25	244	269	3.19%	2.89%
<i>Serbia</i>	27,497	60	508	568	2.07%	1.85%
<i>Seychelles</i>	336	-	5	5	1.49%	1.49%
<i>Sierra Leone</i>	2,844	41	319	360	12.66%	11.22%
<i>Solomon Islands</i>	342	1	102	103	30.12%	29.82%
<i>Somalia</i>	150	2	22	24	16.00%	14.67%
<i>South Africa</i>	121,112	143	1,040	1,183	0.98%	0.86%
<i>South Sudan</i>	207	1	28	29	14.01%	13.53%
<i>Sri Lanka</i>	20,118	38	362	400	1.99%	1.80%
<i>Sudan</i>	4,736	25	624	649	13.70%	13.18%
<i>Suriname</i>	12,003	8	113	121	1.01%	0.94%
<i>Swaziland</i>	792	1	14	15	1.89%	1.77%
<i>Syria</i>	9,633	31	692	723	7.51%	7.18%
<i>Tajikistan</i>	1,401	8	68	76	5.42%	4.85%
<i>Tanzania</i>	5,424	33	85	118	2.18%	1.57%
<i>Thailand</i>	90,471	170	1,789	1,959	2.17%	1.98%
<i>Timor-Leste</i>	32	-	-	-	-	-
<i>Togo</i>	2,246	25	226	251	11.18%	10.06%
<i>Tonga</i>	3,896	22	228	250	6.42%	5.85%
<i>Trinidad and Tobago</i>	180,672	94	1,047	1,141	0.63%	0.58%
<i>Tunisia</i>	9,828	20	159	179	1.82%	1.62%
<i>Turkey</i>	180,265	299	2,606	2,905	1.61%	1.45%
<i>Turkmenistan</i>	979	4	64	68	6.95%	6.54%
<i>Tuvalu</i>	62	-	1	1	1.61%	1.61%
<i>Uganda</i>	7,900	31	373	404	5.11%	4.72%
<i>Ukraine</i>	88,900	171	3,995	4,166	4.69%	4.49%
<i>United Arab Emirates</i>	29,493	217	363	580	1.97%	1.23%
<i>Uruguay</i>	77,977	45	1,159	1,204	1.54%	1.49%
<i>Uzbekistan</i>	10,345	51	523	574	5.55%	5.06%
<i>Vanuatu</i>	130	-	1	1	0.77%	0.77%
<i>Venezuela</i>	538,827	1,005	29,419	30,424	5.65%	5.46%
<i>Vietnam</i>	91,909	493	2,326	2,819	3.07%	2.53%
<i>Yemen</i>	3,645	13	346	359	9.85%	9.49%
<i>Zambia</i>	3,871	10	149	159	4.11%	3.85%
<i>Zimbabwe</i>	7,136	19	176	195	2.73%	2.47%
TOTAL	14,659,249	21,157	280,559	301,716	2.06%	1.91%

D. Nonimmigrant Student and Exchange Visitors Overstay Rates

Table 4

FY 2017 Overstay rates for nonimmigrant students and exchange visitors (F, M, J) admitted to the United States via air and sea POEs (excluding Canada and Mexico)

Country of Citizenship	Expected Departures	Out-of-Country Overstays	Suspected In-Country Overstays	Total Overstays	Total Overstay Rate	Suspected In-Country Overstay Rate
<i>Afghanistan</i>	573	8	90	98	17.10%	15.71%
<i>Albania</i>	975	17	76	93	9.54%	7.79%
<i>Algeria</i>	698	11	21	32	4.58%	3.01%
<i>Andorra</i>	56	-	-	-	-	-
<i>Angola</i>	1,428	73	145	218	15.27%	10.15%
<i>Antigua and Barbuda</i>	297	9	10	19	6.40%	3.37%
<i>Argentina</i>	9,228	128	89	217	2.35%	0.96%
<i>Armenia</i>	526	6	19	25	4.75%	3.61%
<i>Australia</i>	15,080	216	104	320	2.12%	0.69%
<i>Austria</i>	5,115	47	35	82	1.60%	0.68%
<i>Azerbaijan</i>	963	37	100	137	14.23%	10.38%
<i>Bahamas, The</i>	5,812	144	84	228	3.92%	1.45%
<i>Bahrain</i>	895	24	19	43	4.80%	2.12%
<i>Bangladesh</i>	4,027	71	315	386	9.59%	7.82%
<i>Barbados</i>	628	9	7	16	2.55%	1.11%
<i>Belarus</i>	1,266	27	109	136	10.74%	8.61%
<i>Belgium</i>	4,828	60	35	95	1.97%	0.72%
<i>Belize</i>	471	7	24	31	6.58%	5.10%
<i>Benin</i>	319	7	90	97	30.41%	28.21%
<i>Bhutan</i>	180	10	25	35	19.44%	13.89%
<i>Bolivia</i>	2,171	44	57	101	4.65%	2.63%
<i>Bosnia and Herzegovina</i>	907	14	53	67	7.39%	5.84%
<i>Botswana</i>	333	8	14	22	6.61%	4.20%
<i>Brazil</i>	43,991	1,033	1,465	2,498	5.68%	3.33%
<i>Brunei</i>	156	3	5	8	5.13%	3.21%
<i>Bulgaria</i>	6,999	98	218	316	4.51%	3.11%
<i>Burkina Faso</i>	519	18	194	212	40.85%	37.38%
<i>Burma</i>	1,317	33	68	101	7.67%	5.16%
<i>Burundi</i>	185	2	34	36	19.46%	18.38%
<i>Cabo Verde</i>	111	2	25	27	24.32%	22.52%
<i>Cambodia</i>	588	9	29	38	6.46%	4.93%
<i>Cameroon</i>	1,028	21	363	384	37.35%	35.31%
<i>Central African Republic</i>	33	2	6	8	24.24%	18.18%
<i>Chad</i>	79	4	41	45	56.96%	51.90%
<i>Chile</i>	7,834	142	156	298	3.80%	1.99%
<i>China</i>	453,042	8,432	6,673	15,105	3.33%	1.47%
<i>Colombia</i>	22,852	496	699	1,195	5.23%	3.06%
<i>Comoros</i>	11	-	-	-	-	-
<i>Congo (Brazzaville)</i>	186	10	56	66	35.48%	30.11%

Table 4

FY 2017 Overstay rates for nonimmigrant students and exchange visitors (F, M, J) admitted to the United States via air and sea POEs (excluding Canada and Mexico)

Country of Citizenship	Expected Departures	Out-of-Country Overstays	Suspected In-Country Overstays	Total Overstays	Total Overstay Rate	Suspected In-Country Overstay Rate
<i>Congo (Kinshasa)</i>	527	18	175	193	36.62%	33.21%
<i>Costa Rica</i>	3,010	54	37	91	3.02%	1.23%
<i>Croatia</i>	1,938	31	26	57	2.94%	1.34%
<i>Cuba</i>	165	3	3	6	3.64%	1.82%
<i>Cyprus</i>	837	11	9	20	2.39%	1.08%
<i>Czech Republic</i>	5,121	68	50	118	2.30%	0.98%
<i>Côte d'Ivoire</i>	957	45	156	201	21.00%	16.30%
<i>Denmark</i>	5,867	53	21	74	1.26%	0.36%
<i>Djibouti</i>	37	1	8	9	24.32%	21.62%
<i>Dominica</i>	269	6	16	22	8.18%	5.95%
<i>Dominican Republic</i>	4,910	143	153	296	6.03%	3.12%
<i>Ecuador</i>	7,355	112	168	280	3.81%	2.28%
<i>Egypt</i>	6,082	163	482	645	10.61%	7.93%
<i>El Salvador</i>	2,367	46	81	127	5.37%	3.42%
<i>Equatorial Guinea</i>	329	23	48	71	21.58%	14.59%
<i>Eritrea</i>	149	-	104	104	69.80%	69.80%
<i>Estonia</i>	936	2	10	12	1.28%	1.07%
<i>Ethiopia</i>	1,264	29	186	215	17.01%	14.72%
<i>Fiji</i>	123	-	9	9	7.32%	7.32%
<i>Finland</i>	3,247	47	34	81	2.49%	1.05%
<i>France</i>	42,702	481	333	814	1.91%	0.78%
<i>Gabon</i>	380	16	73	89	23.42%	19.21%
<i>Gambia, The</i>	135	1	38	39	28.89%	28.15%
<i>Georgia</i>	1,158	11	33	44	3.80%	2.85%
<i>Germany</i>	46,907	398	253	651	1.39%	0.54%
<i>Ghana</i>	2,309	44	211	255	11.04%	9.14%
<i>Greece</i>	5,055	64	40	104	2.06%	0.79%
<i>Grenada</i>	245	2	15	17	6.94%	6.12%
<i>Guatemala</i>	2,890	59	42	101	3.49%	1.45%
<i>Guinea</i>	115	6	29	35	30.43%	25.22%
<i>Guinea-Bissau</i>	15	1	2	3	20.00%	13.33%
<i>Guyana</i>	322	11	17	28	8.70%	5.28%
<i>Haiti</i>	1,221	38	268	306	25.06%	21.95%
<i>Holy See</i>	-	-	-	-	-	-
<i>Honduras</i>	3,480	77	70	147	4.22%	2.01%
<i>Hungary</i>	3,812	32	22	54	1.42%	0.58%
<i>Iceland</i>	1,188	11	8	19	1.60%	0.67%
<i>India</i>	127,435	1,567	2,833	4,400	3.45%	2.22%
<i>Indonesia</i>	11,310	249	241	490	4.33%	2.13%
<i>Iran</i>	4,418	70	280	350	7.92%	6.34%
<i>Iraq</i>	1,618	91	282	373	23.05%	17.43%
<i>Ireland</i>	13,778	130	111	241	1.75%	0.81%

Table 4

FY 2017 Overstay rates for nonimmigrant students and exchange visitors (F, M, J) admitted to the United States via air and sea POEs (excluding Canada and Mexico)

Country of Citizenship	Expected Departures	Out-of-Country Overstays	Suspected In-Country Overstays	Total Overstays	Total Overstay Rate	Suspected In-Country Overstay Rate
<i>Israel</i>	11,549	265	198	463	4.01%	1.71%
<i>Italy</i>	24,450	208	162	370	1.51%	0.66%
<i>Jamaica</i>	10,623	225	486	711	6.69%	4.57%
<i>Japan</i>	56,275	944	719	1,663	2.96%	1.28%
<i>Jordan</i>	3,975	136	233	369	9.28%	5.86%
<i>Kazakhstan</i>	5,740	186	279	465	8.10%	4.86%
<i>Kenya</i>	2,511	46	288	334	13.30%	11.47%
<i>Kiribati</i>	26	-	-	-	-	-
<i>Korea, North</i>	17	-	-	-	-	-
<i>Korea, South</i>	108,533	1,828	1,601	3,429	3.16%	1.48%
<i>Kuwait</i>	13,017	339	182	521	4.00%	1.40%
<i>Kyrgyzstan</i>	633	20	81	101	15.96%	12.80%
<i>Laos</i>	174	7	5	12	6.90%	2.87%
<i>Latvia</i>	776	6	13	19	2.45%	1.68%
<i>Lebanon</i>	2,971	36	42	78	2.63%	1.41%
<i>Lesotho</i>	68	1	2	3	4.41%	2.94%
<i>Liberia</i>	282	7	64	71	25.18%	22.70%
<i>Libya</i>	896	43	271	314	35.04%	30.25%
<i>Liechtenstein</i>	46	-	-	-	-	-
<i>Lithuania</i>	2,262	24	18	42	1.86%	0.80%
<i>Luxembourg</i>	311	5	-	5	1.61%	-
<i>Macedonia</i>	1,916	34	135	169	8.82%	7.05%
<i>Madagascar</i>	126	3	7	10	7.94%	5.56%
<i>Malawi</i>	332	15	37	52	15.66%	11.14%
<i>Malaysia</i>	8,206	193	165	358	4.36%	2.01%
<i>Maldives</i>	74	-	3	3	4.05%	4.05%
<i>Mali</i>	383	12	42	54	14.10%	10.97%
<i>Malta</i>	123	3	-	3	2.44%	-
<i>Marshall Islands</i>	7	-	-	-	-	-
<i>Mauritania</i>	144	4	30	34	23.61%	20.83%
<i>Mauritius</i>	252	1	3	4	1.59%	1.19%
<i>Micronesia, Federated States of</i>	2	-	-	-	-	-
<i>Moldova</i>	2,051	46	444	490	23.89%	21.65%
<i>Monaco</i>	57	-	-	-	-	-
<i>Mongolia</i>	2,547	104	325	429	16.84%	12.76%
<i>Montenegro</i>	977	42	53	95	9.72%	5.42%
<i>Morocco</i>	2,576	53	103	156	6.06%	4.00%
<i>Mozambique</i>	209	6	8	14	6.70%	3.83%
<i>Namibia</i>	145	1	7	8	5.52%	4.83%
<i>Nauru</i>	3	-	-	-	-	-
<i>Nepal</i>	3,556	78	712	790	22.22%	20.02%

Table 4

FY 2017 Overstay rates for nonimmigrant students and exchange visitors (F, M, J) admitted to the United States via air and sea POEs (excluding Canada and Mexico)

Country of Citizenship	Expected Departures	Out-of-Country Overstays	Suspected In-Country Overstays	Total Overstays	Total Overstay Rate	Suspected In-Country Overstay Rate
<i>Netherlands</i>	10,396	120	47	167	1.61%	0.45%
<i>New Zealand</i>	4,756	86	34	120	2.52%	0.71%
<i>Nicaragua</i>	864	14	15	29	3.36%	1.74%
<i>Niger</i>	210	8	20	28	13.33%	9.52%
<i>Nigeria</i>	9,245	258	2,172	2,430	26.28%	23.49%
<i>Norway</i>	7,596	58	30	88	1.16%	0.39%
<i>Oman</i>	3,094	60	34	94	3.04%	1.10%
<i>Pakistan</i>	7,720	160	349	509	6.59%	4.52%
<i>Palau</i>	5	1	-	1	20.00%	-
<i>Panama</i>	4,687	73	35	108	2.30%	0.75%
<i>Papua New Guinea</i>	129	9	11	20	15.50%	8.53%
<i>Paraguay</i>	1,335	30	26	56	4.19%	1.95%
<i>Peru</i>	12,005	141	247	388	3.23%	2.06%
<i>Philippines</i>	10,798	149	818	967	8.96%	7.58%
<i>Poland</i>	8,815	79	124	203	2.30%	1.41%
<i>Portugal</i>	3,557	77	26	103	2.90%	0.73%
<i>Qatar</i>	2,710	86	17	103	3.80%	0.63%
<i>Romania</i>	8,577	152	246	398	4.64%	2.87%
<i>Russia</i>	14,607	299	582	881	6.03%	3.98%
<i>Rwanda</i>	1,116	42	94	136	12.19%	8.42%
<i>Saint Kitts and Nevis</i>	395	2	8	10	2.53%	2.03%
<i>Saint Lucia</i>	311	9	16	25	8.04%	5.14%
<i>Saint Vincent and the Grenadines</i>	141	2	4	6	4.26%	2.84%
<i>Samoa</i>	26	1	3	4	15.38%	11.54%
<i>San Marino</i>	17	1	-	1	5.88%	-
<i>Sao Tome and Principe</i>	9	1	1	2	22.22%	11.11%
<i>Saudi Arabia</i>	97,136	3,185	1,445	4,630	4.77%	1.49%
<i>Senegal</i>	740	22	103	125	16.89%	13.92%
<i>Serbia</i>	6,178	119	624	743	12.03%	10.10%
<i>Seychelles</i>	40	-	1	1	2.50%	2.50%
<i>Sierra Leone</i>	215	17	48	65	30.23%	22.33%
<i>Singapore</i>	9,004	88	28	116	1.29%	0.31%
<i>Slovakia</i>	4,098	33	33	66	1.61%	0.81%
<i>Slovenia</i>	866	7	7	14	1.62%	0.81%
<i>Solomon Islands</i>	8	2	-	2	25.00%	-
<i>Somalia</i>	45	-	18	18	40.00%	40.00%
<i>South Africa</i>	5,227	89	187	276	5.28%	3.58%
<i>South Sudan</i>	71	1	10	11	15.49%	14.08%
<i>Spain</i>	32,059	386	226	612	1.91%	0.70%
<i>Sri Lanka</i>	2,355	58	150	208	8.83%	6.37%
<i>Sudan</i>	366	9	78	87	23.77%	21.31%

Table 4

FY 2017 Overstay rates for nonimmigrant students and exchange visitors (F, M, J) admitted to the United States via air and sea POEs (excluding Canada and Mexico)

Country of Citizenship	Expected Departures	Out-of-Country Overstays	Suspected In-Country Overstays	Total Overstays	Total Overstay Rate	Suspected In-Country Overstay Rate
<i>Suriname</i>	177	4	3	7	3.95%	1.69%
<i>Swaziland</i>	151	6	2	8	5.30%	1.32%
<i>Sweden</i>	12,817	140	97	237	1.85%	0.76%
<i>Switzerland</i>	8,894	89	47	136	1.53%	0.53%
<i>Syria</i>	516	8	56	64	12.40%	10.85%
<i>Taiwan</i>	35,356	600	308	908	2.57%	0.87%
<i>Tajikistan</i>	527	14	69	83	15.75%	13.09%
<i>Tanzania</i>	1,059	28	79	107	10.10%	7.46%
<i>Thailand</i>	20,039	364	783	1,147	5.72%	3.91%
<i>Timor-Leste</i>	32	-	1	1	3.13%	3.13%
<i>Togo</i>	182	5	34	39	21.43%	18.68%
<i>Tonga</i>	51	3	12	15	29.41%	23.53%
<i>Trinidad and Tobago</i>	3,022	49	35	84	2.78%	1.16%
<i>Tunisia</i>	1,284	27	32	59	4.60%	2.49%
<i>Turkey</i>	25,206	486	767	1,253	4.97%	3.04%
<i>Turkmenistan</i>	393	10	42	52	13.23%	10.69%
<i>Tuvalu</i>	3	-	-	-	-	-
<i>Uganda</i>	968	16	154	170	17.56%	15.91%
<i>Ukraine</i>	8,315	127	859	986	11.86%	10.33%
<i>United Arab Emirates</i>	5,170	100	35	135	2.61%	0.68%
<i>United Kingdom</i>	49,254	580	311	891	1.81%	0.63%
<i>Uruguay</i>	914	14	16	30	3.28%	1.75%
<i>Uzbekistan</i>	1,195	61	88	149	12.47%	7.36%
<i>Vanuatu</i>	8	-	2	2	25.00%	25.00%
<i>Venezuela</i>	15,138	314	773	1,087	7.18%	5.11%
<i>Vietnam</i>	16,900	447	1,032	1,479	8.75%	6.11%
<i>Yemen</i>	1,041	33	145	178	17.10%	13.93%
<i>Zambia</i>	519	13	35	48	9.25%	6.74%
<i>Zimbabwe</i>	1,198	20	92	112	9.35%	7.68%
TOTAL	1,662,369	29,909	39,074	68,983	4.15%	2.35%

E. Overstay Rates for All Other In-scope Classes of Admission

Country of Citizenship	Expected Departures	Out-of-Country Overstays	Suspected In-Country Overstays	Total Overstays	Total Overstay Rate	Suspected In-Country Overstay Rate
<i>Afghanistan</i>	286	5	80	85	29.72%	27.97%
<i>Albania</i>	521	16	69	85	16.31%	13.24%
<i>Algeria</i>	401	6	11	17	4.24%	2.74%
<i>Andorra</i>	86	-	-	-	-	-
<i>Angola</i>	573	2	11	13	2.27%	1.92%
<i>Antigua and Barbuda</i>	162	1	4	5	3.09%	2.47%
<i>Argentina</i>	22,104	98	124	222	1.00%	0.56%
<i>Armenia</i>	727	15	77	92	12.65%	10.59%
<i>Australia</i>	62,626	310	357	667	1.07%	0.57%
<i>Austria</i>	7,099	32	40	72	1.01%	0.56%
<i>Azerbaijan</i>	313	7	12	19	6.07%	3.83%
<i>Bahamas, The</i>	710	5	4	9	1.27%	0.56%
<i>Bahrain</i>	106	1	1	2	1.89%	0.94%
<i>Bangladesh</i>	1,355	31	218	249	18.38%	16.09%
<i>Barbados</i>	539	2	3	5	0.93%	0.56%
<i>Belarus</i>	1,316	27	58	85	6.46%	4.41%
<i>Belgium</i>	11,237	39	27	66	0.59%	0.24%
<i>Belize</i>	461	36	18	54	11.71%	3.90%
<i>Benin</i>	73	1	5	6	8.22%	6.85%
<i>Bhutan</i>	21	1	3	4	19.05%	14.29%
<i>Bolivia</i>	1,321	14	24	38	2.88%	1.82%
<i>Bosnia and Herzegovina</i>	474	13	45	58	12.24%	9.49%
<i>Botswana</i>	132	2	8	10	7.58%	6.06%
<i>Brazil</i>	42,789	387	808	1,195	2.79%	1.89%
<i>Brunei</i>	52	2	10	12	23.08%	19.23%
<i>Bulgaria</i>	2,437	39	52	91	3.73%	2.13%
<i>Burkina Faso</i>	76	-	6	6	7.89%	7.89%
<i>Burma</i>	269	1	30	31	11.52%	11.15%
<i>Burundi</i>	36	-	5	5	13.89%	13.89%
<i>Cabo Verde</i>	165	1	87	88	53.33%	52.73%
<i>Cambodia</i>	542	10	156	166	30.63%	28.78%
<i>Cameroon</i>	508	7	68	75	14.76%	13.39%
<i>Central African Republic</i>	5	-	1	1	20.00%	20.00%
<i>Chad</i>	8	-	3	3	37.50%	37.50%
<i>Chile</i>	8,120	78	71	149	1.83%	0.87%

³⁹ Table 5 complete list of applicable admission classes: A3, CW1, CW2, E1, E2, E2C, E3, E3D, G5, H1B, H1B1, H1C, H2A, H2B, H2R, H3, H4, K1, K2, K3, K4, L1A, L1B, L2, NATO7, N8, N9, O1, O2, O3, P1, P2, P3, P4, Q1, R1, R2, TN, TD, V1, V2, V3

Table 5

FY 2017 Overstay rates for other in-scope nonimmigrant classes of admission admitted to the United States via air and sea POEs for all countries (excluding Canada and Mexico)³⁹

Country of Citizenship	Expected Departures	Out-of-Country Overstays	Suspected In-Country Overstays	Total Overstays	Total Overstay Rate	Suspected In-Country Overstay Rate
<i>China</i>	75,581	752	952	1,704	2.25%	1.26%
<i>Colombia</i>	20,715	122	599	721	3.48%	2.89%
<i>Comoros</i>	2	-	1	1	50.00%	50.00%
<i>Congo (Brazzaville)</i>	76	-	12	12	15.79%	15.79%
<i>Congo (Kinshasa)</i>	125	13	15	28	22.40%	12.00%
<i>Costa Rica</i>	3,646	29	50	79	2.17%	1.37%
<i>Croatia</i>	1,358	11	18	29	2.14%	1.33%
<i>Cuba</i>	1,453	36	100	136	9.36%	6.88%
<i>Cyprus</i>	381	2	4	6	1.57%	1.05%
<i>Czech Republic</i>	3,508	19	21	40	1.14%	0.60%
<i>Côte d'Ivoire</i>	225	1	30	31	13.78%	13.33%
<i>Denmark</i>	10,473	46	24	70	0.67%	0.23%
<i>Djibouti</i>	3	-	-	-	-	-
<i>Dominica</i>	158	-	11	11	6.96%	6.96%
<i>Dominican Republic</i>	9,144	95	1,031	1,126	12.31%	11.28%
<i>Ecuador</i>	3,231	21	143	164	5.08%	4.43%
<i>Egypt</i>	3,775	30	116	146	3.87%	3.07%
<i>El Salvador</i>	2,630	38	263	301	11.44%	10.00%
<i>Equatorial Guinea</i>	20	1	-	1	5.00%	-
<i>Eritrea</i>	89	1	26	27	30.34%	29.21%
<i>Estonia</i>	653	5	5	10	1.53%	0.77%
<i>Ethiopia</i>	1,041	6	134	140	13.45%	12.87%
<i>Fiji</i>	211	1	14	15	7.11%	6.64%
<i>Finland</i>	5,743	29	35	64	1.11%	0.61%
<i>France</i>	88,021	401	303	704	0.80%	0.34%
<i>Gabon</i>	32	-	3	3	9.38%	9.38%
<i>Gambia, The</i>	99	-	11	11	11.11%	11.11%
<i>Georgia</i>	339	5	7	12	3.54%	2.06%
<i>Germany</i>	82,990	271	352	623	0.75%	0.42%
<i>Ghana</i>	1,144	14	141	155	13.55%	12.33%
<i>Greece</i>	4,232	20	20	40	0.95%	0.47%
<i>Grenada</i>	174	2	11	13	7.47%	6.32%
<i>Guatemala</i>	7,531	383	1,208	1,591	21.13%	16.04%
<i>Guinea</i>	93	5	21	26	27.96%	22.58%
<i>Guinea-Bissau</i>	2	-	1	1	50.00%	50.00%
<i>Guyana</i>	286	5	50	55	19.23%	17.48%
<i>Haiti</i>	2,236	26	681	707	31.62%	30.46%
<i>Holy See</i>	1	-	-	-	-	-
<i>Honduras</i>	3,399	155	328	483	14.21%	9.65%
<i>Hungary</i>	3,907	46	44	90	2.30%	1.13%

Table 5

FY 2017 Overstay rates for other in-scope nonimmigrant classes of admission admitted to the United States via air and sea POEs for all countries (excluding Canada and Mexico)³⁹

Country of Citizenship	Expected Departures	Out-of-Country Overstays	Suspected In-Country Overstays	Total Overstays	Total Overstay Rate	Suspected In-Country Overstay Rate
<i>Iceland</i>	1,094	5	10	15	1.37%	0.91%
<i>India</i>	445,446	2,956	6,612	9,568	2.15%	1.48%
<i>Indonesia</i>	2,605	38	154	192	7.37%	5.91%
<i>Iran</i>	1,274	16	87	103	8.08%	6.83%
<i>Iraq</i>	351	3	71	74	21.08%	20.23%
<i>Ireland</i>	22,752	137	80	217	0.95%	0.35%
<i>Israel</i>	18,411	118	101	219	1.19%	0.55%
<i>Italy</i>	44,338	176	165	341	0.77%	0.37%
<i>Jamaica</i>	18,924	1,347	873	2,220	11.73%	4.61%
<i>Japan</i>	156,424	396	426	822	0.53%	0.27%
<i>Jordan</i>	1,022	23	38	61	5.97%	3.72%
<i>Kazakhstan</i>	829	4	33	37	4.46%	3.98%
<i>Kenya</i>	1,572	6	108	114	7.25%	6.87%
<i>Kiribati</i>	14	3	-	3	21.43%	-
<i>Korea, North</i>	8	-	-	-	-	-
<i>Korea, South</i>	44,198	230	506	736	1.67%	1.14%
<i>Kuwait</i>	334	3	4	7	2.10%	1.20%
<i>Kyrgyzstan</i>	155	3	16	19	12.26%	10.32%
<i>Laos</i>	525	3	214	217	41.33%	40.76%
<i>Latvia</i>	708	7	5	12	1.69%	0.71%
<i>Lebanon</i>	1,965	13	31	44	2.24%	1.58%
<i>Lesotho</i>	22	-	-	-	-	-
<i>Liberia</i>	211	4	79	83	39.34%	37.44%
<i>Libya</i>	98	2	15	17	17.35%	15.31%
<i>Liechtenstein</i>	41	-	-	-	-	-
<i>Lithuania</i>	1,042	25	21	46	4.41%	2.02%
<i>Luxembourg</i>	244	-	3	3	1.23%	1.23%
<i>Macedonia</i>	412	8	20	28	6.80%	4.85%
<i>Madagascar</i>	44	-	7	7	15.91%	15.91%
<i>Malawi</i>	135	-	9	9	6.67%	6.67%
<i>Malaysia</i>	4,988	25	57	82	1.64%	1.14%
<i>Maldives</i>	24	-	1	1	4.17%	4.17%
<i>Mali</i>	111	8	12	20	18.02%	10.81%
<i>Malta</i>	158	-	-	-	-	-
<i>Marshall Islands</i>	-	-	-	-	-	-
<i>Mauritania</i>	42	-	2	2	4.76%	4.76%
<i>Mauritius</i>	179	-	6	6	3.35%	3.35%
<i>Micronesia, Federated States of</i>	-	-	-	-	-	-
<i>Moldova</i>	412	4	42	46	11.17%	10.19%
<i>Monaco</i>	60	-	-	-	-	-

Table 5

FY 2017 Overstay rates for other in-scope nonimmigrant classes of admission admitted to the United States via air and sea POEs for all countries (excluding Canada and Mexico)³⁹

Country of Citizenship	Expected Departures	Out-of-Country Overstays	Suspected In-Country Overstays	Total Overstays	Total Overstay Rate	Suspected In-Country Overstay Rate
<i>Mongolia</i>	245	23	22	45	18.37%	8.98%
<i>Montenegro</i>	110	3	5	8	7.27%	4.55%
<i>Morocco</i>	1,242	10	66	76	6.12%	5.31%
<i>Mozambique</i>	67	1	3	4	5.97%	4.48%
<i>Namibia</i>	53	-	3	3	5.66%	5.66%
<i>Nauru</i>	-	-	-	-	-	-
<i>Nepal</i>	1,890	6	87	93	4.92%	4.60%
<i>Netherlands</i>	25,256	109	90	199	0.79%	0.36%
<i>New Zealand</i>	7,119	45	57	102	1.43%	0.80%
<i>Nicaragua</i>	1,380	22	91	113	8.19%	6.59%
<i>Niger</i>	41	-	6	6	14.63%	14.63%
<i>Nigeria</i>	4,287	21	434	455	10.61%	10.12%
<i>Norway</i>	7,121	39	21	60	0.84%	0.29%
<i>Oman</i>	146	-	-	-	-	-
<i>Pakistan</i>	5,258	29	206	235	4.47%	3.92%
<i>Palau</i>	1	-	1	1	100.00%	100.00%
<i>Panama</i>	1,521	4	37	41	2.70%	2.43%
<i>Papua New Guinea</i>	17	1	-	1	5.88%	-
<i>Paraguay</i>	389	1	14	15	3.86%	3.60%
<i>Peru</i>	5,981	86	389	475	7.94%	6.50%
<i>Philippines</i>	25,038	629	6,446	7,075	28.26%	25.74%
<i>Poland</i>	7,711	68	79	147	1.91%	1.02%
<i>Portugal</i>	5,743	47	31	78	1.36%	0.54%
<i>Qatar</i>	73	3	1	4	5.48%	1.37%
<i>Romania</i>	4,724	67	141	208	4.40%	2.98%
<i>Russia</i>	14,445	136	408	544	3.77%	2.82%
<i>Rwanda</i>	106	2	12	14	13.21%	11.32%
<i>Saint Kitts and Nevis</i>	137	-	-	-	-	-
<i>Saint Lucia</i>	107	2	4	6	5.61%	3.74%
<i>Saint Vincent and the Grenadines</i>	56	-	3	3	5.36%	5.36%
<i>Samoa</i>	61	1	2	3	4.92%	3.28%
<i>San Marino</i>	4	-	-	-	-	-
<i>Sao Tome and Principe</i>	-	-	-	-	-	-
<i>Saudi Arabia</i>	1,894	23	13	36	1.90%	0.69%
<i>Senegal</i>	329	2	25	27	8.21%	7.60%
<i>Serbia</i>	1,797	35	59	94	5.23%	3.28%
<i>Seychelles</i>	6	-	2	2	33.33%	33.33%
<i>Sierra Leone</i>	146	1	57	58	39.73%	39.04%
<i>Singapore</i>	6,973	43	64	107	1.53%	0.92%
<i>Slovakia</i>	1,793	27	11	38	2.12%	0.61%

Table 5

FY 2017 Overstay rates for other in-scope nonimmigrant classes of admission admitted to the United States via air and sea POEs for all countries (excluding Canada and Mexico)³⁹

Country of Citizenship	Expected Departures	Out-of-Country Overstays	Suspected In-Country Overstays	Total Overstays	Total Overstay Rate	Suspected In-Country Overstay Rate
<i>Slovenia</i>	926	5	5	10	1.08%	0.54%
<i>Solomon Islands</i>	-	-	-	-	-	-
<i>Somalia</i>	61	-	14	14	22.95%	22.95%
<i>South Africa</i>	11,555	300	186	486	4.21%	1.61%
<i>South Sudan</i>	37	-	13	13	35.14%	35.14%
<i>Spain</i>	48,790	202	143	345	0.71%	0.29%
<i>Sri Lanka</i>	1,637	8	35	43	2.63%	2.14%
<i>Sudan</i>	91	-	6	6	6.59%	6.59%
<i>Suriname</i>	72	1	4	5	6.94%	5.56%
<i>Swaziland</i>	58	1	1	2	3.45%	1.72%
<i>Sweden</i>	17,046	87	76	163	0.96%	0.45%
<i>Switzerland</i>	10,290	41	35	76	0.74%	0.34%
<i>Syria</i>	379	9	58	67	17.68%	15.30%
<i>Taiwan</i>	15,541	84	99	183	1.18%	0.64%
<i>Tajikistan</i>	43	-	6	6	13.95%	13.95%
<i>Tanzania</i>	339	3	19	22	6.49%	5.60%
<i>Thailand</i>	3,651	80	376	456	12.49%	10.30%
<i>Timor-Leste</i>	1	-	1	1	100.00%	100.00%
<i>Togo</i>	79	1	25	26	32.91%	31.65%
<i>Tonga</i>	156	-	10	10	6.41%	6.41%
<i>Trinidad and Tobago</i>	3,772	18	55	73	1.94%	1.46%
<i>Tunisia</i>	448	3	15	18	4.02%	3.35%
<i>Turkey</i>	8,502	54	136	190	2.23%	1.60%
<i>Turkmenistan</i>	67	1	4	5	7.46%	5.97%
<i>Tuvalu</i>	2	-	-	-	-	-
<i>Uganda</i>	701	38	47	85	12.13%	6.70%
<i>Ukraine</i>	7,279	148	465	613	8.42%	6.39%
<i>United Arab Emirates</i>	488	8	2	10	2.05%	0.41%
<i>United Kingdom</i>	155,722	934	802	1,736	1.11%	0.52%
<i>Uruguay</i>	1,489	4	17	21	1.41%	1.14%
<i>Uzbekistan</i>	338	1	33	34	10.06%	9.76%
<i>Vanuatu</i>	30	1	-	1	3.33%	-
<i>Venezuela</i>	23,835	129	489	618	2.59%	2.05%
<i>Vietnam</i>	4,775	124	1,573	1,697	35.54%	32.94%
<i>Yemen</i>	302	-	117	117	38.74%	38.74%
<i>Zambia</i>	134	2	3	5	3.73%	2.24%
<i>Zimbabwe</i>	654	3	28	31	4.74%	4.28%
TOTAL	1,730,106	13,119	32,877	45,996	2.66%	1.90%

F. Canada and Mexico Nonimmigrant Overstay Rates

Table 6 FY 2017 Overstay rates for Canadian and Mexican nonimmigrants admitted to the United States via air and sea POEs						
Country of Citizenship (admission class)	Expected Departures	Out-of-Country Overstays	Suspected In-Country Overstays	Total Overstays	Total Overstay Rate	Suspected In-Country Overstay Rate
<i>Canada (B1/B2)</i>	8,748,750	6,204	90,707	96,911	1.11%	1.04%
<i>Mexico (B1/B2)</i>	2,739,158	3,257	44,250	47,507	1.73%	1.62%
<i>B1/B2 Total</i>	<i>11,487,908</i>	<i>9,461</i>	<i>134,957</i>	<i>144,418</i>	<i>1.26%</i>	<i>1.17%</i>
<i>Canada (F, M, J)</i>	67,931	491	812	1,303	1.92%	1.20%
<i>Mexico (F, M, J)</i>	41,075	550	665	1,215	2.96%	1.62%
<i>F, M, J Total</i>	<i>109,006⁴⁰</i>	<i>1,041⁴¹</i>	<i>1,477⁴²</i>	<i>2,518</i>	<i>2.31%</i>	<i>1.35%</i>
<i>Canada (Other In-Scope)</i>	398,477	1,685	1,382	3,067	0.77%	0.35%
<i>Mexico (Other In-Scope)</i>	136,197	1,658	2,479	4,137	3.04%	1.82%
<i>Other In-Scope Total</i>	<i>534,674</i>	<i>3,343</i>	<i>3,861</i>	<i>7,204</i>	<i>1.42%</i>	<i>0.72%</i>
<i>Canada Total</i>	<i>9,215,158</i>	<i>8,380</i>	<i>92,901</i>	<i>101,281</i>	<i>1.10%</i>	<i>1.01%</i>
<i>Mexico Total</i>	<i>2,916,430</i>	<i>5,465</i>	<i>47,394</i>	<i>52,859</i>	<i>1.81%</i>	<i>1.63%</i>
Grand Total	12,131,588	13,845	140,295	154,140	1.27%	1.16%

Table 6 represents Canadian and Mexican nonimmigrant visitors admitted at air and sea POEs who were expected to depart in FY 2017. Unlike all other countries, the overwhelming majority of travelers from Canada or Mexico enter the United States by land. Overstay data concerning land entries will be incorporated into future iterations of this report as projects progress.

⁴⁰ The Canada and Mexico Expected Departure total comprises 79,497 for the F visa category, 1,439 for the M visa category, 28,072 for the J visa category

⁴¹ The Canada and Mexico Out-of-Country Overstay total comprises 783 for the F visa category, 46 for the M visa category, 232 for the J visa category

⁴² The Canada and Mexico Suspected In-Country Overstay total comprises 829 for the F visa category, 67 for the M visa category, 581 for the J visa category

G. Overstay Duration Highlights

Table 7 Duration of Overstay among Out-of-Country Overstays of 60 Days or Fewer						
Duration of Overstay (Days or Fewer)	10	20	30	40	50	60
	30,653	40,138	47,189	52,633	57,514	62,185
Percentage of 60 Day Total	49%	65%	76%	85%	92%	100%

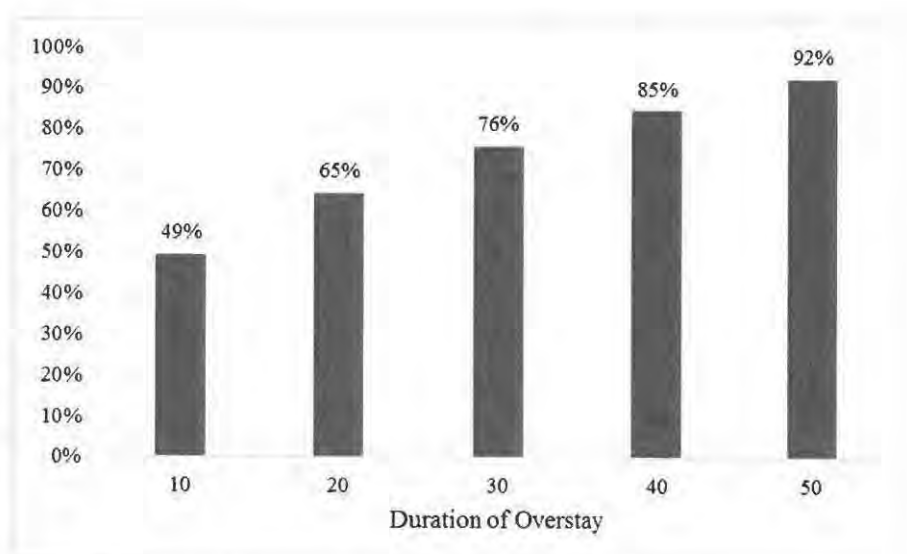


Figure 1: Duration of Overstay among Out-of-Country Overstays of 60 Days or Fewer

Among the Out-of-Country Overstays of 60 days or fewer, 49 percent left within the first 10 days, 65 percent left within the first 20 days, 76 percent left within the first 30 days, 85 percent left within the first 40 days, and 92 percent left within the first 50 days.⁴³

⁴³ Table 7 includes 768 Out-of-Country Overstays (1.3% of the 62,185 overstays of 60 days or fewer) that were identified as Suspected In-Country Overstays in the FY 2017 Report, but as of December 1, 2017 switched to Out-of-Country Overstays due to a departure. DHS added this population to adjust for statistical bias associated with overstays that occurred at the end of the FY 2017 reporting period.

Table 8 FY 2017 Summary Overstay rates over time for Nonimmigrants admitted to the United States via air and sea POEs					
	Overstay Status at the end of FY 2017			Overstay Status as of May 1, 2018	
Admission Type	Expected Departures	Suspected In-Country Overstays	Suspected In-Country Overstay Rate	Suspected In-Country Overstays	Suspected In-Country Overstay Rate
<i>VWP Countries Business or Pleasure Visitors</i>	22,472,710	114,121	0.51%	91,080	0.41%
<i>Non-VWP Countries Business or Pleasure Visitors (excluding Canada and Mexico)</i>	14,659,249	280,559	1.91%	207,606	1.42%
<i>Student and Exchange Visitors (excluding Canada and Mexico)</i>	1,662,369	39,074	2.35%	23,852	1.43%
<i>All Other In-Scope Nonimmigrants (excluding Canada and Mexico)</i>	1,730,106	32,877	1.90%	20,677	1.20%
<i>Canada and Mexico Nonimmigrants</i>	12,131,588	140,295	1.16%	78,110	0.64%
TOTAL	52,656,022	606,926	1.15%	421,325	0.80%

Table 9 FY 2016 Summary Overstay rates over time for Nonimmigrants admitted to the United States via air and sea POEs					
	Overstay Status at the end of FY 2016			Overstay Status as of May 1, 2018	
Admission Type	Expected Departures	Suspected In-Country Overstays	Suspected In-Country Overstay Rate	Suspected In-Country Overstays	Suspected In-Country Overstay Rate
<i>VWP Countries Business or Pleasure Visitors</i>	21,616,034	128,806	0.60%	89,390	0.41%
<i>Non-VWP Countries Business or Pleasure Visitors (excluding Canada and Mexico)</i>	13,848,480	263,470	1.90%	155,095	1.12%
<i>Student and Exchange Visitors (excluding Canada and Mexico)</i>	1,457,556	40,949	2.81%	16,970	1.16%
<i>All Other In-Scope Nonimmigrants (excluding Canada and Mexico)</i>	1,427,188	29,498	2.07%	14,423	1.01%
<i>Canada and Mexico Nonimmigrants</i>	12,088,020	166,076	1.37%	65,990	0.55%
TOTAL	50,437,278	628,799	1.25%	341,868	0.68%

V. Conclusion

Identifying aliens who overstay their authorized periods of stay is important for national security, public safety, immigration enforcement, and processing applications for immigration benefits.

Over the years, DHS significantly improved data collection processes in the entry environment. These improvements include the collection of data on all admissions to the United States by foreign nationals, the reduction of the number of documents that may be used for entry to the United States, the collection of biometric data on most foreign travelers to the United States, and the comparison of that data against criminal and terrorist watchlists. Despite the different infrastructural, operational, and logistical challenges presented in the exit environment, DHS has been able to resolve many of the issues regarding the collection of departure information for foreign nationals. Further efforts, including partnerships with other governments and the private sector (e.g., airlines airports, cruise lines), are ongoing and will continue to improve data integrity.

During the past three years, DHS made significant progress in terms of the ability to accurately report data on overstays—progress that was made possible by congressional realignment of Department resources in order to better centralize the overall mission in identifying overstays. In FY 2017, new biometric exit tests in both the land and air environment enabled continued progress toward the fusion of biometric and biographic verification of travelers. While these tests account for only a small percentage of all the departure records for FY 2017, this is a significant increase from FY 2016 and a critical step forward towards implementing a comprehensive biometric entry and exit system.

DHS will continue to develop and test the entry and exit system during FY 2018, both biometric and biographic, and this testing will improve CBP's ability to capture and report this data accurately. DHS will continue to annually release this overstay data to the public and examine trends over time, and looks forward to providing updates to congressional members and their staff on its ongoing progress.

VI. Appendices

Appendix A. In-Scope Nonimmigrant Classes of Admission

CLASS OF ADMISSION DESCRIPTION	CODE
Temporary Workers and Trainees	
Commonwealth of the Northern Mariana Islands (CNMI)-only transitional workers	CW1
Spouses and children of CW1	CW2
Temporary workers in specialty occupations	H1B
Chile and Singapore Free Trade Agreement aliens	H1B1
Registered nurses participating in the Nursing Relief for Disadvantaged Areas	H1C
Agricultural workers	H2A
Nonagricultural workers	H2B
Returning H2B workers	H2R
Trainees	H3
Spouse and unmarried child(ren) under 21 years of age of H1B, H1B1, H1C, H2A, H2B, H2R, or H3	H4
Workers with extraordinary ability or achievement	O1
Workers accompanying and assisting in performance of O1 workers	O2
Spouses and children of O1 and O2	O3
Internationally recognized athletes or entertainers	P1
Artists or entertainers in reciprocal exchange programs	P2
Artists or entertainers in culturally unique programs	P3
Spouses and children of P1, P2, or P3	P4
Workers in international cultural exchange programs	Q1
Workers in religious occupations	R1
Spouses and children of R1	R2
North American Free Trade Agreement professional workers	TN
Spouses and children of TN	TD
Intracompany Transferees	
Intracompany transferees	L1 ⁴⁴
Spouses and children of L1	L2
Treaty Traders and Investors	

⁴⁴ Includes L1A and L1B classes of admission

CLASS OF ADMISSION DESCRIPTION	CODE
Treaty traders and their spouses and children	E1
Treaty investors and their spouses and children	E2
Treaty investors and their spouses and children CNMI only	E2C
Australian Free Trade Agreement principals, spouses and children	E3 ⁴⁵
Students	
Academic students	F1
Spouses and children of F1	F2
Vocational students	M1
Spouses and children of M1	M2
Exchange Visitors	
Exchange visitors	J1
Spouses and children of J1	J2
Temporary Visitors for Pleasure	
Temporary visitors for pleasure	B2
Visa Waiver Program – temporary visitors for pleasure	WT
Temporary Visitors for Business	
Temporary visitors for business	B1
Visa Waiver Program – temporary visitors for business	WB
Alien Fiancées of U.S. Citizens and Children	
Fiancées of U.S. citizens	K1
Children of K1	K2
Legal Immigration Family Equity LIFE Act	
Spouses of U.S. citizens, visa pending	K3
Children of U.S. citizens, visa pending	K4
Spouses of permanent residents, visa pending	V1
Children of permanent residents, visa pending	V2
Dependents of V1 or V2, visa pending	V3
Other	
Attendants, servants, or personal employees of A1 and A2 and their families	A3
Attendants, servants, or personal employees of diplomats or other representatives	G5
Attendant, servant, personal employer of North Atlantic Treaty Organization (NATO)	NATO-
NATO-1 through NATO-6 or Immediate Family	7

⁴⁵ Includes E3D and E3R classes of admission

Appendix B. Out-of-Scope Nonimmigrant Classes of Admission

CLASS OF ADMISSION DESCRIPTION	CODE
Diplomats and Other Representatives	
Representatives of foreign information media and spouses and children	I1
Ambassadors, public ministers, career diplomatic/consular officers and families	A1
Other foreign government officials or employees and their families	A2
Principals of recognized foreign governments	G1
Other representatives of recognized foreign governments	G2
Representatives of non-recognized or nonmember foreign governments	G3
International organization officers or employees	G4
NATO officials, spouses, and children	NATO-1 to NATO-6
Transit Aliens	
Aliens in continuous and immediate transit through the United States	C1
Aliens in transit to the United Nations	C2
Foreign government officials, their spouses, children, and attendants in transit	C3
Special Classes	
Alien Witness or Informant	S5
Alien Witness or Informant	S6
Qualified Family Member of S5, S6	S7
Victim of Trafficking, Special Protected Class	T1
Spouse of T1, Special Protected Class	T2
Spouse of T1, Special Protected Class	T3
Parent of T1, Special Protected Class	T4
Sibling unmarried of T1, Special Protected Class	T5
Victim of Criminal Activity, Special Protected Class	U1
Spouse of U2, Special Protected Class	U2
Spouse of U1, Special Protected Class	U3
Parent of U1, Special Protected Class	U4
Sibling unmarried of U1, Special Protected Class	U5
Special Protected Class, Violence against Women Act	VAWA
Other	
Crewmen	D1
Crewman-different vessel/flight	D2

Appendix C. FY 2016 Overstay Rates

FY 2016 Entry/Exit Overstay Report Overview

Below are the tabulated rates from the Fiscal Year 2016 Entry and Exit Overstay Report. The inclusion of these tables is for reference only. The FY 2016 Report provides data on expected departures and overstays, by country, for foreign travelers to the United States who entered as nonimmigrants through an air or sea port of entry (POE) and who were expected to depart in FY 2016 (October 1, 2015 – September 30, 2016). It does this by examining the number of entries, by country, for foreign travelers who arrived as nonimmigrants during this time as of October 1, 2016.

At the end of FY 2016, the overall Suspected In-Country Overstay number – i.e., those for whom the Department did not have evidence of a departure or transition to another immigration status – was 628,799, or 1.25 percent. As included in the FY 2016 Report, by January 2017, the number of Suspected In-Country overstays had dropped to 544,676, rendering the Suspected In-Country Overstay rate 1.07 percent. As of December 2017, the number of Suspected In-Country overstays for FY 2016 had further dropped to 403,415, rendering the Suspected In-Country Overstay rate 0.80 percent. As of May 1, 2018 the number of Suspected In-Country Overstays further decreased to 340,377 rendering the FY 2016 Suspected In-Country Overstay rate 0.67 percent.

Country of Citizenship	Expected Departures	Out-of-Country Overstays	Suspected In-Country Overstays	Total Overstays	Total Overstay Rate	Suspected In-Country Overstay Rate
<i>Andorra</i>	1,308	-	9	9	0.69%	0.69%
<i>Australia</i> ⁴⁶	1,362,199	980	6,583	7,563	0.56%	0.48%
<i>Austria</i>	211,224	116	2,784	2,900	1.37%	1.32%
<i>Belgium</i>	288,117	178	1,369	1,547	0.54%	0.48%
<i>Brunei</i>	1,125	1	10	11	0.98%	0.89%
<i>Chile</i>	363,570	813	5,416	6,229	1.71%	1.49%
<i>Czech Republic</i>	103,158	214	927	1,141	1.11%	0.90%
<i>Denmark</i> ⁴⁷	329,981	158	1,505	1,663	0.50%	0.46%
<i>Estonia</i>	23,158	35	160	195	0.84%	0.69%
<i>Finland</i>	156,057	112	604	716	0.46%	0.39%
<i>France</i> ⁴⁸	1,751,536	1,629	10,358	11,987	0.68%	0.59%
<i>Germany</i>	2,061,112	1,416	18,780	20,196	0.98%	0.91%
<i>Greece</i>	77,562	421	1,280	1,701	2.19%	1.65%
<i>Hungary</i>	82,533	431	1,841	2,272	2.75%	2.23%

⁴⁶ Australia includes Australia, Norfolk Island, Christmas Island, and Cocos (Keeling) Island.

⁴⁷ Denmark includes Denmark, Faroe Islands, and Greenland.

⁴⁸ France includes France, French Guiana, French Polynesia, French Southern and Antarctic Lands, Guadeloupe, Martinique, Mayotte, New Caledonia, Reunion, Saint Barthelemy, Saint Pierre and Miquelon, and Wallis and Futuna.

Table C-1

FY 2016 Overstay rates for nonimmigrant visitors admitted to the United States for business or pleasure (WB/WT/B-1/B-2) via air and sea POEs for VWP Countries

Country of Citizenship	Expected Departures	Out-of-Country Overstays	Suspected In-Country Overstays	Total Overstays	Total Overstay Rate	Suspected In-Country Overstay Rate
<i>Iceland</i>	54,806	28	154	182	0.33%	0.28%
<i>Ireland</i>	483,613	392	2,177	2,569	0.53%	0.45%
<i>Italy</i>	1,207,242	1,480	14,896	16,376	1.36%	1.23%
<i>Japan</i>	3,007,800	441	4,401	4,842	0.16%	0.15%
<i>Korea, South</i>	1,266,839	1,368	4,507	5,875	0.46%	0.36%
<i>Latvia</i>	20,344	107	249	356	1.75%	1.22%
<i>Liechtenstein</i>	2,082	2	15	17	0.82%	0.72%
<i>Lithuania</i>	30,846	129	484	613	1.99%	1.57%
<i>Luxembourg</i>	14,251	11	100	111	0.78%	0.70%
<i>Malta</i>	6,047	7	54	61	1.01%	0.89%
<i>Monaco</i>	1,097	2	4	6	0.55%	0.36%
<i>Netherlands</i> ⁴⁹	721,977	511	4,081	4,592	0.64%	0.57%
<i>New Zealand</i> ⁵⁰	308,703	273	1,526	1,799	0.58%	0.49%
<i>Norway</i>	281,559	158	992	1,150	0.41%	0.35%
<i>Portugal</i>	164,662	621	3,365	3,986	2.42%	2.04%
<i>San Marino</i>	697	2	12	14	2.01%	1.72%
<i>Singapore</i>	127,149	146	471	617	0.49%	0.37%
<i>Slovakia</i>	46,449	156	703	859	1.85%	1.51%
<i>Slovenia</i>	24,158	27	223	250	1.03%	0.92%
<i>Spain</i>	940,218	1,969	11,716	13,685	1.46%	1.25%
<i>Sweden</i>	560,320	370	2,601	2,971	0.53%	0.46%
<i>Switzerland</i>	434,189	289	2,257	2,546	0.59%	0.52%
<i>Taiwan</i>	388,713	681	1,522	2,203	0.57%	0.39%
<i>United Kingdom</i> ⁵¹	4,709,633	2,802	20,670	23,472	0.50%	0.44%
TOTAL	21,616,034	18,476	128,806	147,282	0.68%	0.60%

⁴⁹ Netherlands includes the Netherlands, Aruba, Bonaire, Curacao, Saba, Sint Eustatius, and Sint Maarten.

⁵⁰ New Zealand includes New Zealand, Cook Islands, Tokelau, and Niue.

⁵¹ United Kingdom includes the United Kingdom, Anguilla, Bermuda, British Virgin Islands, Cayman Islands, Falkland Islands, Gibraltar, Guernsey, Isle of Man, Jersey, Montserrat, Pitcairn Islands, Saint Helena, and Turks and Caicos Islands.

Table C-2

FY 2016 Overstay rates for nonimmigrants admitted to the United States for business or pleasure via air and sea POEs for non-VWP Countries (excluding Canada, Mexico, and Students)

Country Of Citizenship	Expected Departures	Out-of-Country Overstays	Suspected In-Country Overstays	Total Overstays	Total Overstay Rate	Suspected In-Country Overstay Rate
<i>Afghanistan</i>	2,123	8	291	299	14.08%	13.71%
<i>Albania</i>	7,881	32	349	381	4.83%	4.43%
<i>Algeria</i>	9,710	39	356	395	4.07%	3.67%
<i>Angola</i>	8,307	29	286	315	3.79%	3.44%
<i>Antigua and Barbuda</i>	15,444	39	205	244	1.58%	1.33%
<i>Argentina</i>	840,739	318	6,752	7,070	0.84%	0.80%
<i>Armenia</i>	6,659	15	282	297	4.46%	4.24%
<i>Azerbaijan</i>	5,579	18	198	216	3.87%	3.55%
<i>Bahamas, The</i>	233,902	344	3,876	4,220	1.80%	1.66%
<i>Bahrain</i>	7,480	13	101	114	1.52%	1.35%
<i>Bangladesh</i>	27,865	73	1,009	1,082	3.88%	3.62%
<i>Barbados</i>	59,316	74	1,621	1,695	2.86%	2.73%
<i>Belarus</i>	14,659	29	544	573	3.91%	3.71%
<i>Belize</i>	27,168	53	576	629	2.32%	2.12%
<i>Benin</i>	2,017	9	104	113	5.60%	5.16%
<i>Bhutan</i>	394	3	99	102	25.89%	25.13%
<i>Bolivia</i>	63,071	110	1,129	1,239	1.96%	1.79%
<i>Bosnia and Herzegovina</i>	6,884	30	157	187	2.72%	2.28%
<i>Botswana</i>	2,016	5	24	29	1.44%	1.19%
<i>Brazil</i>	2,074,363	2,526	36,929	39,455	1.90%	1.78%
<i>Bulgaria</i>	27,469	87	401	488	1.78%	1.46%
<i>Burkina Faso</i>	4,494	27	1,146	1,173	26.10%	25.50%
<i>Burma</i>	4,877	13	232	245	5.02%	4.76%
<i>Burundi</i>	1,046	8	146	154	14.72%	13.96%
<i>Cabo Verde</i>	4,166	30	719	749	17.98%	17.26%
<i>Cambodia</i>	2,792	4	50	54	1.93%	1.79%
<i>Cameroon</i>	8,665	143	832	975	11.25%	9.60%
<i>Central African Republic</i>	197	-	23	23	11.68%	11.68%
<i>Chad</i>	643	2	106	108	16.80%	16.49%
<i>China</i> ⁵²	2,058,311	2,493	17,108	19,601	0.95%	0.83%
<i>Colombia</i>	863,417	1,062	18,404	19,466	2.26%	2.13%
<i>Comoros</i>	75	-	3	3	4.00%	4.00%
<i>Congo (Brazzaville)</i> ⁵³	1,221	4	101	105	8.60%	8.27%
<i>Congo (Kinshasa)</i> ⁵⁴	5,412	35	474	509	9.41%	8.76%
<i>Costa Rica</i>	260,245	231	2,530	2,761	1.06%	0.97%
<i>Côte d'Ivoire</i>	22,075	31	197	228	1.03%	0.89%
<i>Croatia</i>	48,719	194	712	906	1.86%	1.46%
<i>Cuba</i>	8,844	11	89	100	1.13%	1.01%

⁵² China includes the People's Republic of China, Hong Kong, and Macau.

⁵³ Congo (Brazzaville) refers to the Republic of the Congo.

⁵⁴ Congo (Kinshasa) refers to the Democratic Republic of the Congo.

Table C-2

FY 2016 Overstay rates for nonimmigrants admitted to the United States for business or pleasure via air and sea POEs for non-VWP Countries (excluding Canada, Mexico, and Students)

Country Of Citizenship	Expected Departures	Out-of-Country Overstays	Suspected In-Country Overstays	Total Overstays	Total Overstay Rate	Suspected In-Country Overstay Rate
<i>Cyprus</i>	5,795	40	433	473	8.16%	7.47%
<i>Djibouti</i>	382	9	95	104	27.23%	24.87%
<i>Dominica</i>	7,248	23	268	291	4.02%	3.70%
<i>Dominican Republic</i>	341,628	442	9,211	9,653	2.83%	2.70%
<i>Ecuador</i>	392,521	387	7,356	7,743	1.97%	1.87%
<i>Egypt</i>	80,716	201	1,715	1,916	2.37%	2.13%
<i>El Salvador</i>	183,255	308	4,771	5,079	2.77%	2.60%
<i>Equatorial Guinea</i>	937	7	43	50	5.34%	4.59%
<i>Eritrea</i>	2,390	133	473	606	25.36%	19.79%
<i>Ethiopia</i>	14,645	96	662	758	5.18%	4.52%
<i>Fiji</i>	8,159	34	262	296	3.63%	3.21%
<i>Gabon</i>	1,961	22	83	105	5.35%	4.23%
<i>Gambia, The</i>	1,614	17	181	198	12.27%	11.21%
<i>Georgia</i>	7,456	20	1,036	1,056	14.16%	13.90%
<i>Ghana</i>	21,602	104	963	1,067	4.94%	4.46%
<i>Grenada</i>	10,877	39	301	340	3.13%	2.77%
<i>Guatemala</i>	247,084	362	5,442	5,804	2.35%	2.20%
<i>Guinea</i>	2,332	22	199	221	9.48%	8.53%
<i>Guinea-Bissau</i>	144	1	20	21	14.58%	13.89%
<i>Guyana</i>	54,471	113	1,811	1,924	3.53%	3.33%
<i>Haiti</i>	129,617	669	5,000	5,669	4.37%	3.86%
<i>Holy See</i>	17	-	-	-	0.00%	0.00%
<i>Honduras</i>	182,601	272	5,085	5,357	2.93%	2.79%
<i>India</i>	1,004,245	2,040	15,723	17,763	1.77%	1.57%
<i>Indonesia</i>	80,936	115	1,196	1,311	1.62%	1.48%
<i>Iran</i>	23,749	121	588	709	2.99%	2.48%
<i>Iraq</i>	9,140	54	986	1,040	11.38%	10.79%
<i>Israel</i>	374,404	451	3,584	4,035	1.08%	0.96%
<i>Jamaica</i>	281,797	444	9,177	9,621	3.41%	3.26%
<i>Jordan</i>	37,792	272	2,256	2,528	6.69%	5.97%
<i>Kazakhstan</i>	18,157	40	494	534	2.94%	2.72%
<i>Kenya</i>	20,178	114	723	837	4.15%	3.58%
<i>Kiribati</i>	100	-	2	2	2.00%	2.00%
<i>Korea, North</i> ⁵⁵	80	-	-	-	0.00%	0.00%
<i>Kuwait</i>	49,210	486	828	1,314	2.67%	1.68%
<i>Kyrgyzstan</i>	2,292	13	128	141	6.15%	5.59%
<i>Laos</i>	1,247	14	146	160	12.83%	11.71%
<i>Lebanon</i>	39,454	100	928	1,028	2.61%	2.35%
<i>Lesotho</i>	317	1	6	7	2.21%	1.89%
<i>Liberia</i>	3,894	68	677	745	19.13%	17.39%
<i>Libya</i>	1,074	7	64	71	6.61%	5.96%

⁵⁵ North Korea refers to the Democratic People's Republic of Korea.

Table C-2

FY 2016 Overstay rates for nonimmigrants admitted to the United States for business or pleasure via air and sea POEs for non-VWP Countries (excluding Canada, Mexico, and Students)

Country Of Citizenship	Expected Departures	Out-of-Country Overstays	Suspected In-Country Overstays	Total Overstays	Total Overstay Rate	Suspected In-Country Overstay Rate
<i>Macedonia</i>	6,349	22	166	188	2.96%	2.62%
<i>Madagascar</i>	930	3	13	16	1.72%	1.40%
<i>Malawi</i>	2,005	6	99	105	5.24%	4.94%
<i>Malaysia</i>	77,827	93	1,284	1,377	1.77%	1.65%
<i>Maldives</i>	196	-	3	3	1.53%	1.53%
<i>Mali</i>	2,936	15	164	179	6.10%	5.59%
<i>Marshall Islands</i>	60	-	8	8	13.33%	13.33%
<i>Mauritania</i>	1,212	16	174	190	15.68%	14.36%
<i>Mauritius</i>	3,286	3	30	33	1.00%	0.91%
<i>Micronesia, Federated States of</i>	40	1	9	10	25.00%	22.50%
<i>Moldova</i>	8,557	31	399	430	5.03%	4.66%
<i>Mongolia</i>	10,215	48	746	794	7.77%	7.30%
<i>Montenegro</i>	4,361	10	233	243	5.57%	5.34%
<i>Morocco</i> ⁵⁶	27,294	100	557	657	2.41%	2.04%
<i>Mozambique</i>	1,827	8	39	47	2.57%	2.14%
<i>Namibia</i>	1,589	3	22	25	1.57%	1.39%
<i>Nauru</i>	25	1	-	1	4.00%	0.00%
<i>Nepal</i>	18,775	157	789	946	5.04%	4.20%
<i>Nicaragua</i>	66,206	105	1,339	1,444	2.18%	2.02%
<i>Niger</i>	902	5	42	47	5.21%	4.66%
<i>Nigeria</i>	189,883	582	11,461	12,043	6.34%	6.04%
<i>Oman</i>	4,897	10	46	56	1.14%	0.94%
<i>Pakistan</i>	87,871	226	2,415	2,641	3.01%	2.75%
<i>Palau</i>	57	-	4	4	7.02%	7.02%
<i>Panama</i>	158,076	143	805	948	0.60%	0.51%
<i>Papua New Guinea</i>	1,266	6	5	11	0.87%	0.40%
<i>Paraguay</i>	27,836	28	409	437	1.57%	1.47%
<i>Peru</i>	296,684	454	5,310	5,764	1.94%	1.79%
<i>Philippines</i>	250,753	562	4,438	5,000	1.99%	1.77%
<i>Poland</i>	176,495	334	2,787	3,121	1.77%	1.58%
<i>Qatar</i>	14,382	81	196	277	1.93%	1.36%
<i>Romania</i>	66,451	186	1,052	1,238	1.86%	1.58%
<i>Russia</i>	256,280	334	3,344	3,678	1.44%	1.31%
<i>Rwanda</i>	2,646	10	110	120	4.54%	4.16%
<i>Saint Kitts and Nevis</i>	12,115	18	262	280	2.31%	2.16%
<i>Saint Lucia</i>	15,616	31	320	351	2.25%	2.05%
<i>Saint Vincent and the Grenadines</i>	9,608	20	342	362	3.77%	3.56%
<i>Samoa</i>	2,006	18	103	121	6.03%	5.14%
<i>Sao Tome and Principe</i>	45	-	1	1	2.22%	2.22%

⁵⁶ Morocco includes Morocco and Western Sahara.

Table C-2

FY 2016 Overstay rates for nonimmigrants admitted to the United States for business or pleasure via air and sea POEs for non-VWP Countries (excluding Canada, Mexico, and Students)

Country Of Citizenship	Expected Departures	Out-of-Country Overstays	Suspected In-Country Overstays	Total Overstays	Total Overstay Rate	Suspected In-Country Overstay Rate
<i>Saudi Arabia</i>	135,108	990	1,429	2,419	1.79%	1.06%
<i>Senegal</i>	7,564	31	272	303	4.01%	3.60%
<i>Serbia</i>	23,175	73	507	580	2.50%	2.19%
<i>Seychelles</i>	352	1	2	3	0.85%	0.57%
<i>Sierra Leone</i>	2,426	27	157	184	7.59%	6.47%
<i>Solomon Islands</i>	174	-	-	-	0.00%	0.00%
<i>Somalia</i>	137	-	8	8	5.84%	5.84%
<i>South Africa</i>	121,072	178	837	1,015	0.84%	0.69%
<i>South Sudan</i>	257	1	6	7	2.72%	2.34%
<i>Sri Lanka</i>	18,333	43	315	358	1.95%	1.72%
<i>Sudan</i>	3,885	26	341	367	9.45%	8.78%
<i>Suriname</i>	14,485	11	118	129	0.89%	0.82%
<i>Swaziland</i>	651	-	8	8	1.23%	1.23%
<i>Syria</i>	11,821	64	726	790	6.68%	6.14%
<i>Tajikistan</i>	1,308	19	119	138	10.55%	9.10%
<i>Tanzania</i>	6,496	18	181	199	3.06%	2.79%
<i>Thailand</i>	84,785	168	1,954	2,122	2.50%	2.31%
<i>Timor-Leste</i>	51	-	2	2	3.92%	3.92%
<i>Togo</i>	1,912	20	197	217	11.35%	10.30%
<i>Tonga</i>	3,632	13	295	308	8.48%	8.12%
<i>Trinidad and Tobago</i>	181,218	129	868	997	0.55%	0.48%
<i>Tunisia</i>	8,900	15	198	213	2.39%	2.23%
<i>Turkey</i>	176,695	312	2,531	2,843	1.61%	1.43%
<i>Turkmenistan</i>	951	2	44	46	4.84%	4.63%
<i>Tuvalu</i>	52	1	-	1	1.92%	0.00%
<i>Uganda</i>	7,362	34	379	413	5.61%	5.15%
<i>Ukraine</i>	83,401	243	2,707	2,950	3.54%	3.25%
<i>United Arab Emirates</i>	30,577	275	452	727	2.38%	1.48%
<i>Uruguay</i>	77,164	76	1,353	1,429	1.85%	1.75%
<i>Uzbekistan</i>	9,592	39	803	842	8.78%	8.37%
<i>Vanuatu</i>	126	1	1	2	1.59%	0.79%
<i>Venezuela</i>	551,048	915	22,906	23,821	4.32%	4.16%
<i>Vietnam</i>	79,097	393	2,689	3,082	3.90%	3.40%
<i>Yemen</i>	2,887	20	194	214	7.41%	6.72%
<i>Zambia</i>	3,662	6	120	126	3.44%	3.28%
<i>Zimbabwe</i>	6,802	20	148	168	2.47%	2.18%
TOTAL	13,848,480	23,637	263,470	287,107	2.07%	1.90%

Table C-3

FY 2016 Overstay rates for Canadian and Mexican nonimmigrants admitted to the United States via air and sea POEs

Country of Citizenship (admission class)	Expected Departures	Out-of- Country Overstays	Suspected In-Country Overstays	Total Overstays	Total Overstay Rate	Suspected In-Country Overstay Rate
<i>Canada (B1/B2)</i>	8,620,361	7,128	117,267	124,395	1.44%	1.36%
<i>Mexico (B1/B2)</i>	2,927,848	4,110	43,742	47,852	1.63%	1.49%
<i>B1/B2 Total</i>	<i>11,548,209</i>	<i>11,238</i>	<i>161,009</i>	<i>172,247</i>	<i>1.49%</i>	<i>1.39%</i>
<i>Canada (F, M, J)</i>	54,786	783	806	1,589	2.90%	1.47%
<i>Mexico (F, M, J)</i>	37,157	789	738	1,527	4.11%	1.99%
<i>F, M, J Total</i>	<i>91,943⁵⁷</i>	<i>1,572⁵⁸</i>	<i>1,544⁵⁹</i>	<i>3,116</i>	<i>3.39%</i>	<i>1.68%</i>
<i>Canada (Other In-Scope)</i>	333,349	1,982	1,345	3,327	1.00%	0.40%
<i>Mexico (Other In-Scope)</i>	114,519	1,401	2,178	3,579	3.13%	1.90%
<i>Other In-Scope Total</i>	<i>447,868</i>	<i>3,383</i>	<i>3,523</i>	<i>6,906</i>	<i>1.54%</i>	<i>0.79%</i>
<i>Canada Total</i>	<i>9,008,496</i>	<i>9,893</i>	<i>119,418</i>	<i>129,311</i>	<i>1.44%</i>	<i>1.33%</i>
<i>Mexico Total</i>	<i>3,079,524</i>	<i>6,300</i>	<i>46,658</i>	<i>52,958</i>	<i>1.72%</i>	<i>1.52%</i>
Grand Total	12,088,020	16,193	166,076	182,269	1.51%	1.37%

⁵⁷ The Canada and Mexico Expected Departure total comprises of 64,370 for the F visa category, 1,290 for the M visa category, 26,283 for the J visa category

⁵⁸ The Canada and Mexico Out-of-Country Overstay total comprises of 1,247 for the F visa category, 41 for the M visa category, 284 for the J visa category

⁵⁹ The Canada and Mexico Suspected In-Country Overstay total comprises of 899 for the F visa category, 40 for the M visa category, 605 for the J visa category

Appendix D. Abbreviation and Acronyms

ABBREVIATION/ACRONYM	DESCRIPTION
ADIS	Arrival and Departure Information System
ATS	Automated Targeting System
AVU	ADIS Vetting Unit
BE-Mobile	Biometric Exit Mobile
CBP	U.S. Customs and Border Protection
CBPO	U.S. Customs and Border Protection Officer
CLAIMS 3	Computer Linked Application Information Management System 3
CNMI	Commonwealth of the Northern Mariana Islands
CTCEU	Counterterrorism and Criminal Exploitation Unit
DHS	Department of Homeland Security
DOS	Department of State
ERO	Enforcement and Removal Operations
ESTA	Electronic System for Travel Authorization
FY	Fiscal Year
HSI	Homeland Security Investigations
ICE	U.S. Immigration and Customs Enforcement
INM	Mexico's National Institute of Migration
NATO	North Atlantic Treaty Organization
NCTC	National Counterterrorism Center
NCATC	National Criminal Analysis and Targeting Center
POE	Port of Entry
RFID	Radio Frequency Identification
SEVIS	Student and Exchange Visitor Information System
SEVP	Student and Exchange Visitor Program
USCIS	U.S. Citizenship and Immigration Services
VAWA	Violence Against Women Act
VWP	Visa Waiver Program

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U.S. Department of Homeland Security

U.S. Citizenship and Immigration Services

Administrative Appeals Office

MATTER OF CHAWATHE

Decided October 20, 2010¹

****1 *369** (1) For purposes of establishing the requisite continuous residence in naturalization proceedings pursuant to section 316(b) of the Immigration and Nationality Act, 8 U.S.C. § 1427(b) (2006), a publicly held corporation may be deemed an “American firm or corporation” if the applicant establishes that the corporation is both incorporated in the United States and trades its stock exclusively on U.S. stock exchange markets.

(2) When an applicant's employer is a publicly held corporation that is incorporated in the United States and trades its stock exclusively on U.S. stock markets, the applicant need not demonstrate the nationality of the corporation by establishing the nationality of those persons who own more than 51% of the stock of that firm. *Matter of Warrach*, 17 I&N Dec. 285, 286-87 (Reg. Comm'r 1979), clarified.

(3) In most administrative immigration proceedings, the applicant must prove by a preponderance of evidence that he or she is eligible for the benefit sought.

(4) Even if the director has some doubt as to the truth, if the petitioner submits relevant, probative, and credible evidence that leads the director to believe that the claim is “more likely than not” or “probably” true, the applicant has satisfied the standard of proof. *Matter of E-M-*, 20 I&N Dec. 77, 79-80 (Comm'r 1989), followed.

(5) If the director can articulate a material doubt, it is appropriate for the director to either request additional evidence or, if that doubt leads the director to believe that the claim is probably not true, deny the application or petition.

ON BEHALF OF APPLICANT: Pro se

BEFORE: Perry Rhew, Chief, Administrative Appeals Office

The application to preserve residence for naturalization purposes was denied by the Acting District Director, San Francisco, California, and is now ***370** before the Administrative Appeals Office (“AAO”) on appeal. The appeal will be sustained.

The primary question presented in this matter is whether a publicly traded corporation may be considered an “American firm or corporation,” pursuant to section 316(b) of the Immigration and Nationality Act, 8 U.S.C. § 1427(b) (2006), when its stock ownership is widely dispersed and there is no readily available means to determine the nationality of its owners.² Upon review, the AAO concludes that a publicly held corporation may be deemed an “American firm or corporation” for purposes of section 316(b) of the Act if the applicant establishes that the corporation is both incorporated in the United States and trades its stock exclusively on U.S. stock markets.

I. FACTUAL AND PROCEDURAL HISTORY

****2** The applicant is an employee of ChevronTexaco Corporation who was granted permanent resident status on June 26, 2000, as a member of a profession holding an advanced degree or having exceptional ability. Expecting to file an application for naturalization as a United States citizen in the future, the applicant filed an Application to Preserve Residence for Naturalization Purposes (Form N-470) with his local immigration office in San Francisco, California, on January 30, 2003. The applicant seeks to preserve his residence for naturalization purposes under section 316(b) of the Act as a lawful permanent resident who will be temporarily absent from the United States for the purpose of employment with an “American firm or corporation.”

In order to be naturalized as a United States citizen, the Act requires in part that a person reside continuously in the United States as a lawful permanent resident for at least 5 years prior to filing an application for naturalization, and that the person be physically present in the United States for at least one half of the required residency period. *See generally* section 316 of the Act. Section 316(b) of the Act provides that an absence from the United States for a continuous period of 1 year or more shall break the continuity of the required 5-year period of continuous residence.

However, section 316(b) of the Act also provides that no period of absence from the United States shall break the continuity of residence if the applicant proves to the satisfaction of the Secretary of Homeland Security that he or she

***371** has been physically present and residing in the United States after being lawfully admitted for permanent residence for an uninterrupted period of at least one year and ... is employed by an American firm or corporation engaged in whole or in part in the development of foreign trade and commerce of the United States, or a subsidiary thereof more than 50 per centum of whose stock is owned by an American firm or corporation

In the present matter, the director determined that the applicant had failed to establish that his employer, ChevronTexaco Corporation, was an “American firm or corporation” as required by the Act. The director determined further that the applicant had failed to establish that his temporary overseas employer, Saudi Arabian Texaco, qualified as a ChevronTexaco Corporation “subsidiary” under section 316(b) of the Act. The director denied the application for preservation of residence for naturalization purposes on this basis.

On appeal, the applicant asserts that his employer, ChevronTexaco Corporation (hereafter referred to as ChevronTexaco), was incorporated in the State of Delaware and qualifies as an “American firm or corporation” under section 316(b) of the Act. The applicant also asserts that Saudi Arabian Texaco is owned and controlled by ChevronTexaco and therefore qualifies as a “subsidiary of an American corporation.”

II. “AMERICAN FIRM OR CORPORATION”

****3** For purposes of section 316(b) of the Act, the nationality of a firm or corporation has traditionally been determined through tracing the percentage of individual ownership interest in a firm or corporation, and by tracing the nationality of the persons having principal ownership interests (more than 50%) in the firm or corporation. The Immigration and Naturalization Service Regional Commissioner stated in *Matter of Warrach*, 17 I&N Dec. 285, 286-87 (Reg. Comm'r 1979), that

when it is shown that 51 percent or more of the stock of the employer corporation is owned by a foreign firm, such firm is a “foreign corporation” within the meaning of section 316(b). The fact that a firm is incorporated under the laws of a state of the United States does not necessarily determine that it is an American firm or corporation. The nationality of such firm would be determined by the nationality of those persons who own more than 51 percent of the stock of that firm.

Thus, under the principles set forth in *Matter of Warrach*, ChevronTexaco's incorporation in the State of Delaware does not establish that ChevronTexaco is an “American firm or corporation.” Rather, the applicant must also demonstrate that more than 50% of ChevronTexaco is owned by persons who are United States citizens. The applicant in the present

matter provided no evidence to establish who the individual *372 ChevronTexaco stockholders are, or to establish the percentage of ownership interests held by each stockholder. Nor did the applicant provide evidence or information to establish the nationality of each stockholder or owner of the corporation. The applicant therefore failed to establish that ChevronTexaco is an “American corporation” as defined in *Matter of Warrach*.

The AAO notes that the principles set forth in *Matter of Warrach* apply well to traditional situations involving closely held companies or corporations. However, the *Warrach* principles fail to address or to take into account the difficulties of tracing the ownership interests and nationalities of modern, publicly held corporations that have thousands of stockholders and capital stock that is traded on a daily basis on the stock markets.³

The present record contains a copy of ChevronTexaco Corporation's 2002 Securities and Exchange Commission (“SEC”) Annual Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934, (SEC Form 10-K). An SEC Form 10-K is the report that publicly held corporations file with the SEC on an annual basis; the report provides a comprehensive overview of a corporation's business and financial condition and includes audited financial statements. *See generally* U.S. SEC, Quick Answers, *Form 10-K*, <http://www.sec.gov/answers/form10k.htm> (last modified June 26, 2009).

**4 In the present matter, the submitted SEC Form 10-K reflects that ChevronTexaco is incorporated in the State of Delaware and that ChevronTexaco stock is traded on the New York Stock Exchange, located in New York, New York, and on the Pacific Stock Exchange, located in San Francisco, California. The AAO notes that the Restated Certificate of Incorporation of ChevronTexaco Corporation, dated October 9, 2001, reflects that ChevronTexaco stock is traded publicly, and that “[t]he total of shares of all classes of stock which the Corporation shall have authority to issue is four billion one hundred million (4,100,000,000), of which one hundred million (100,000,000) shares shall be Preferred Stock ... and four billion (4,000,000,000) shares shall be Common Stock.”

The AAO recognizes that the widely dispersed ownership of publicly held corporations makes it extremely difficult, if not impossible, for an applicant *373 under section 316(b) of the Act to trace the interests and nationalities of its stockholders. As in this case, a publicly traded corporation may issue billions of shares of stock which are traded daily by the general public.

Examining a question relating to the nationality of a corporation and section 319(b) of the Act, 8 U.S.C. § 1430 (2006), a 1995 Legal Opinion by the Immigration and Naturalization Service, Office of the General Counsel (now Citizenship and Immigration Services, Office of Chief Counsel) discussed the United States Department of State regulations and precedent legal decisions interpreting the definition of a corporation's nationality for purposes of the treaty trader and investor nonimmigrant visa classification.⁴ The Legal Opinion observed that a corporation is normally found to have the nationality of whoever owns more than 50% of the corporation's capital stock. The Legal Opinion indicated that it would be anomalous to have two conflicting principles to decide the same issue, with the variance depending upon which section of the Act applied to the case. *See* Office of INS Gen. Counsel, U.S. Dep't of Justice, *Interpretation of American Firm or Corporation for section 319(b) of the Act*, Genco Op. No. 95-21 (Sept. 14, 1995), *available at* 1995 WL 1796328. The Legal Opinion concluded that the definition of “American firm or corporation” established for purposes of nonimmigrant treaty traders and investors should also apply to relevant cases under sections 316(b) and 319(b) of the Act, as well.⁵

The AAO notes that the Department of State expanded the nationality definition of a corporation for nonimmigrant treaty trader and investor purposes in Volume 9 of the Foreign Affairs Manual, 9 FAM 41.51 note 3.2, which states, in pertinent part:

In cases where a corporation is sold exclusively on a stock exchange in the country of incorporation, however, one can presume that the nationality of the corporation is that of the location of the exchange. The applicant should still, and may

be requested to provide the best evidence available to support such *374 a presumption. In the case of a multinational corporation whose stock is exchanged in more than one country, then the applicant must satisfy the consular officer by the best evidence available that the business meets the nationality requirement.

**5 As noted by *Matter of Warrach*, 17 I&N Dec. at 287, the fact that a firm is incorporated under the laws of a State of the United States does not necessarily determine that it is an American firm or corporation. However, given the difficulty of tracing the nationalities and ownership interests of modern public corporations, the AAO finds that it is reasonable to presume that a publicly held corporation meets the definition of “American firm or corporation” for section 316(b) purposes if the applicant demonstrates that the employer is both incorporated in the United States and trades its stock exclusively on U.S. stock markets.⁶

In the present matter, the AAO finds that the evidence contained in the record establishes that ChevronTexaco is incorporated in the United States and that it is a publicly held corporation whose stock is exclusively sold on United States stock exchange markets. The applicant has therefore established that ChevronTexaco qualifies as an “American firm or corporation” under section 316(b) of the Act.

III. SUBSIDIARY AND “PREPONDERANCE OF EVIDENCE”

In addition, the AAO finds that the applicant has established that Saudi Arabia Texaco (“SAT”) qualifies as a “subsidiary” of ChevronTexaco under section 316(b) of the Act. Under section 316(b) of the Act, an applicant must establish that she or he is “[e]mployed by an American firm or corporation engaged in whole or in part in the development of foreign trade and commerce of the United States, or a subsidiary thereof more than 50 per centum of whose stock is owned by an American firm or corporation.”

The AAO notes that the ChevronTexaco SEC Form 10-K submitted by the applicant states that ChevronTexaco Corporation, a Delaware corporation, manages its investments in subsidiaries and affiliates, and provides administrative, financial and management support to U.S. and foreign subsidiaries that engage in fully integrated petroleum operations, chemicals operations, coal mining, power and energy services. The company operates in the United States and approximately 180 other countries.

*375 See SEC Form 10-K at 3. In discussing its international operations, the SEC Form 10-K states further that “Saudi Arabia Texaco, a *ChevronTexaco subsidiary*, holds a concession to produce onshore crude oil from the Partitioned Neutral Zone (PNZ), located between the Kingdom of Saudi Arabia and the State of Kuwait.” *Id.* at 15-16 (emphasis added).

In addition, the record contains a letter written by Mr. Tim Miller, Assistant to the President, Saudi Arabian Texaco, stating that “ChevronTexaco is engaged in the development of foreign trade and commerce of the United States through its *wholly-owned subsidiary*—Saudi Arabian Texaco (SAT), which is located in Kuwait.” (Emphasis added.) The letter also states that the applicant will be assigned temporarily to SAT in Kuwait for 2 to 3 years in the same capacity that he fills at ChevronTexaco in California, and that while abroad, the applicant will continue to be paid his annual salary by ChevronTexaco.

**6 Although the applicant could have submitted more probative evidence to establish that SAT is a subsidiary of ChevronTexaco, such as direct evidence of the ownership of SAT stock, the AAO finds that the SEC Form 10-K and the letter written by his employer are sufficient to establish by a preponderance of evidence that SAT is a wholly owned subsidiary of ChevronTexaco.⁷ Except where a different standard is specified by law, a petitioner or applicant in administrative immigration proceedings must prove by a preponderance of evidence that he or she is eligible for the

benefit sought. *See, e.g., Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997) (noting that the petitioner must prove eligibility by a preponderance of evidence in visa petition proceedings); *Matter of Soo Hoo*, 11 I&N Dec. 151, 152 (BIA 1965) (finding that the petitioner had not established eligibility by a preponderance of the evidence because the submitted evidence was not credible); *cf. Matter of Patel*, 19 I&N Dec. 774, 782-3 (BIA 1988) (noting that section 204(a)(2)(A) of the Act, 8 U.S.C. § 1154(a)(2)(A) (Supp. IV 1986), requires a higher standard of clear and convincing evidence to rebut the presumption of a fraudulent prior marriage).

***376** The “preponderance of the evidence” standard requires that the evidence demonstrate that the applicant's claim is “probably true,” where the determination of “truth” is made based on the factual circumstances of each individual case. *Matter of E-M-*, 20 I&N Dec. 77, 79-80 (Comm'r 1989). In evaluating the evidence, *Matter of E-M-*, also stated that “[t]ruth is to be determined not by the quantity of evidence alone but by its quality.” *Id.* at 80. Thus, in adjudicating the application pursuant to the preponderance of the evidence standard, the director must examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true.

Even if the director has some doubt as to the truth, if the petitioner submits relevant, probative, and credible evidence that leads the director to believe that the claim is “more likely than not” or “probably” true, the applicant or petitioner has satisfied the standard of proof. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 431 (1987) (discussing “more likely than not” as a greater than 50% chance of an occurrence taking place). If the director can articulate a material doubt, it is appropriate for the director to either request additional evidence or, if that doubt leads the director to believe that the claim is probably not true, deny the application or petition.

****7** Here, the submitted evidence is relevant, probative, and credible. As a document that is based on audited financial statements and reviewed by a Federal agency, the information in the SEC Form 10-K is highly credible and warrants substantial weight in immigration proceedings. And although the specific claim that SAT is a “wholly-owned subsidiary” is not supported by independent evidence, the letter from the applicant's employer is relevant, uncontroverted by any other evidence, and generally supported by the SEC Form 10-K. Furthermore, as the assistant to the president of SAT, the author is in a position to have first-hand knowledge of the corporation's relationship with ChevronTexaco. As required under the applicable standard of proof, the evidence establishes that it is “probably” true that SAT is a subsidiary of an “American firm or corporation,” with at least 50% of its stock owned by ChevronTexaco, as required by section 316(b) of the Act.

The AAO finds that the evidence sufficiently establishes that the applicant's overseas employer, Saudi Arabian Texaco, qualifies as a subsidiary of ChevronTexaco under section 316(b) of the Act. The evidence further establishes that the applicant's assignment to work with SAT is temporary and for the purpose of assisting ChevronTexaco to engage in the development of foreign trade and commerce.

***377 IV. CONCLUSION**

From the evidence in the record, the AAO finds that ChevronTexaco meets the definition of an “American corporation,” since it is incorporated in the United States and is publicly traded solely on U.S. stock exchanges. The AAO also finds that Saudi Arabian Texaco is a “subsidiary” of ChevronTexaco, and that ChevronTexaco owns more than 50% of the stock in Saudi Arabian Texaco. On the basis of these findings, the AAO concludes that the applicant meets the requirements for preservation of his residence for naturalization purposes pursuant to section 316(b) of the Act. The appeal will therefore be sustained.

ORDER: The appeal is sustained.

Footnotes

- 1 This matter was initially decided on January 11, 2006, and designated as an “adopted decision” of U.S. Citizenship and Immigration Services (“USCIS”), guiding USCIS officers in their administration of the immigration laws. It was not designated as precedent under 8 C.F.R. § 1003.1(i) (2010) until October 20, 2010. On our own motion, we reopen and amend the decision for the limited purpose of making editorial revisions consistent with designation of the decision as precedent.
- 2 A “stock” is a proportional part of a corporation's capital represented by the total number of equal units (or shares) owned, and granting the stockholder the right to participate in the management of the corporation and share in its profits. *See generally Black's Law Dictionary* 1428 (7th ed. 2002).
- 3 In general, the capital stock of a corporation may be “closely held” or “publicly held.” A closely held corporation issues stock to a few stockholders, and that stock is not traded on the public stock markets or securities exchanges. By contrast, the stock of a publicly held corporation is listed on the public stock markets and is traded to and among the general public. *See Black's Law Dictionary, supra*, at 341-44. The U.S. public stock markets or securities exchanges include the New York Stock Exchange (NYSE), the Nasdaq Stock Market (NASDAQ), the American Stock Exchange (AMEX) [now known as NYSE Amex Equities], the Philadelphia Stock Exchange (PHLX), the Chicago Stock Exchange (CHX), Boston Stock Exchange (BSE), and the National Stock Exchange (NSX).
- 4 Section 319(b) of the Act relates, in part, to the naturalization requirements of spouses of United States citizens who are employed overseas by an “American firm or corporation” and who are engaged in whole or in part in the development of foreign trade and commerce of the United States, or a subsidiary thereof.
- 5 The current case, however, is readily distinguished from the case addressed by the 1995 Legal Opinion. The alien in that case was employed by a closely held corporation that was the wholly owned subsidiary of a multi-tiered business entity. The ultimate parent corporation was incorporated abroad, and the majority of its stock was owned by persons who were not U.S. citizens or nationals. Thus, the employing corporation was a foreign corporation because the ultimate parent corporation was a foreign corporation. In this current appeal, the AAO is examining the nationality of the publicly traded parent corporation, rather than a closely held subsidiary.
- 6 Note that both facts must be present in order for a publicly traded firm to be considered “American.” If a firm or corporation does not satisfy both criteria, the applicant must meet the requirements of *Matter of Warrach*, 17 I&N Dec. at 285, to establish that the employer is an “American firm or corporation.”
- 7 The standard of proof should not be confused with the burden of proof. The burden of proving eligibility for the benefit sought remains entirely with the applicant. Section 316(b)(2) of the Act; *see also* section 291 of the Act, 8 U.S.C. § 1361 (2006). Additionally, the “preponderance of the evidence” standard does not relieve the petitioner or applicant from satisfying the basic evidentiary requirements set by regulation. There are no regulations relating to a corporation's eligibility as an “American firm or corporation” under section 316(b) of the Act. Had the regulations required specific evidence, the applicant would have been required to submit that evidence. *Cf.* 8 C.F.R. § 204.5(h)(3) (2006) (requiring that specific objective evidence be submitted to demonstrate eligibility as an alien of extraordinary ability).

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STAKEHOLDER COMMENTS MATRIX

Accrual of Unlawful Presence and F, J, and M Nonimmigrants

INSTRUCTIONS: Use this matrix to record and reconcile stakeholder comments.
Transcribe comments from the Master List provided by CSPE into this matrix. One comment per row, please.
(Rows will expand to accommodate their contents. Insert or remove extra rows as needed.)

STAKEHOLDER/ ORGANIZATION	STAKEHOLDER COMMENTS	ORIGINATING OFFICE'S RESOLUTIONS
[REDACTED]@ [REDACTED]	I don't recommended this change, in my mind The United State is a immigrant country, but during those few years American people keep shut the door upon people's face. People wants to live in U.S because we love this country, we have friends or family in there. Please call off this policy!!!	
Jean SmilingCoyote [REDACTED]@ [REDACTED]	I am in favor of this policy change. People are supposed to keep track of expiration dates on important documents which have them, and do what they have to do to renew or comply with these documents. If they don't it's their problem. We know that many foreigners have overstayed their visas to become illegal aliens. It has to stop - to be stopped. This policy change will help. I don't have any more specific comments. It's pretty simple to me.	
Aziz Pulatov [REDACTED]@ [REDACTED]	There are thousands of people who previously held VISA such as F and J and joined US ARMY through MAVNI program. Military Assession Vital to National Interest. Also have family members with them J1/J2. Due to long background check process most of them fell out of status against their own will. Since they are not suppose to leave the US to adjust their VISA, otherwise they risk to not come back after signing the enlistment contract. It has been almost 3 years for many MAVNI soldiers and since MAVNI soldiers signed contract and took their oath to be loyal to the United States of America and serve this country and ready to give their lives. This policy change may affect many of MAVNI soldiers if they reach 3 years since they sign contract and didn't get background investigation completed response - MSSD and not naturalize till that time or may discharge due to medical or other reasons. Personally, I am one of those MAVNI soldiers who signed the enlistment contract to US ARMY on April 2016 and have been waiting for my background investigation to be completed more than two years and my naturalization application is still on hold because of above reasons. (Background check). If one reach 3 year mark and still not naturalized and didn't get MSSD. Then he/she risks to be discharged.	

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STAKEHOLDER/ ORGANIZATION	STAKEHOLDER COMMENTS	ORIGINATING OFFICE'S RESOLUTIONS
	<p>This policy will really harm this type of people who fall out of their status against their will. I personally believe, there definitely should be exception for MAVNI soldiers.</p> <p>More detail about MAVNIs in limbo: https://www.google.com/amp/s/www.military.com/daily-news/2018/04/15/recruits-bureaucratic-limbo-citizenship-program-suspended.html/amp And https://www.buzzfeed.com/verabergengruen/more-bad-news-for-immigrant-military-recruits-who-were</p> <p>Please let me know if you have any questions</p>	
Nguyen Truong [REDACTED]@ [REDACTED]	<p>Hi, I have a question about this problem, I am a international student, and I got married with my husband. But we failed to change my status. However. I always remain my student status and study well to finish my course. Also. I and my husband will try to make another application to change my status as soon as we can. So, will I be in the unlawful presence?</p>	
Andrea Pietrzyk [REDACTED]@ [REDACTED]	<p>I am a Designated School Official and am voicing my concerns about this policy memorandum.</p> <p>First, this policy reinforces the perception that the government is unwelcoming to international students. What happens to the student who has a legitimate reason for overstaying? Planes get cancelled; people get sick and can't make their flight; students on OPT accumulate more than 90 days of unemployment because their EAD was never mailed or was lost in the mail. But this policy is putting them in the same basket as people who willfully and knowingly overstay their visa.</p> <p>Second, it seems like it would require significant resources to track any student who has overstayed his or her visa. The Department of Homeland Security already can't track students who have accumulated more than 90 days of unemployment; how is the government going to track this?</p> <p>Thank you for your time.</p>	
Yizhi Zhao [REDACTED]@ [REDACTED]	<p>I am writing to add a new perspective into the draft policy memorandum regarding accrual of unlawful presence and F, J and M Nonimmigrants. I strongly recommend that we resume the previous grace period of 60 days for the students who complete their program, as this beneficial for both students and US economy.</p> <p>Each year, thousands of foreign high school students attend summer schools at US universities in summer. After the program, they will also stay there for two or three weeks, so that they could visit</p>	

STAKEHOLDER/ ORGANIZATION	STAKEHOLDER COMMENTS	ORIGINATING OFFICE'S RESOLUTIONS
	<p>different universities, go sightseeing or even attend the SAT exam in August, which is the most important test for students to apply for college after the College Board cancelled the June SAT test outside North America.</p> <p>One student will roughly spend over 10,000 dollars in after their program finishes and over 40,000 dollars if you take their entire expenses during the summer school into consideration. The new draft, if comes into active, will be a huge blow on those students and cause a financial loss of millions of dollars to the US.</p> <p>Please reconsider the starting date for illegal presence of students who have finished their program successfully.</p>	
<p>Greg Wymer – MBA; M.S. EDL Director, International Students and Scholars Office of International Affairs and Outreach</p> <p>[REDACTED]</p> <p>Brookings, SD [REDACTED]</p> <p>Phone: [REDACTED]</p> <p>Fax: [REDACTED]@[REDACTED]</p>	<p>I had a chance to read the draft policy memorandum for accrual of unlawful presence for F, J, and M nonimmigrants. I am concerned about the following:</p> <p>Foreign students (F nonimmigrant) generally do not accrue unlawful presence in certain situations, including but are not limited to:</p> <p>The period of time an F-1 nonimmigrant was out of status if he or she applies for reinstatement under 8 CFR 214.2(f)(16), provided that the application is ultimately approved:²⁹</p> <p>The reason why I am concerned is that if a student applies for reinstatement and is denied, then the date of when they lost their status/ or failed to pursue a full course of study would begin the count/accrual of unlawful presence. I would suggest that the accrual date for unlawful presence should begin on the date they receive their denial letter. Students currently have a presumptive 5 month period to apply for reinstatement, and if the USCIS takes 6-12 months to process reinstatements (as has been the current trend) then the student would easily find themselves accruing more than 6-12 months of unlawful presence subjecting them to the 3 year or 10 year bar. Furthermore, it has been our understanding that, generally speaking, students who have an application pending with the USCIS are considered to be legally present while that application is pending. Would the time their application is pending not be counted toward unlawful presence? If not, those students who are denied reinstatement may immediately be subject to the 10 year bar on repeat participation.</p> <p>Please clarify.</p>	
<p>Sylvie Lourdes [REDACTED]@[REDACTED]</p>	<p>The manner in which USCIS is planning to calculate the unlawful presence for J-1 F-1 and M-1 visas</p>	



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	<p>applicants who were admitted D/S or duration of status has unfair ramifications that can cause significant litigation and confusion for USCIS</p> <p>The day after they no longer pursue the course of study or the authorized activity, or the day after they engage in an unauthorized activity;</p> <p>Firstly, there has to be an element of minor flexibility for students and exchange visitors. There is a system in place to monitor these immigrants, but i think that having them accrue unlawful presence the minute they no longer attend class will be messy. Sometimes because of medical or family emergencies the student or exchange visitor misses class. This is not against the school policy however, you will be creating much more work for the govt in terms of tracking and reviewing these claims, which are largely necessary. SEVIS tracks these people so if they fail to attend classes for 30 days etc., formal findings can be made at that time.</p> <p>The day after their i-94 expires is also contrary to the purpose of Duration of Status. Typically the I-94 does not have an expiration date, so that is confusing.</p> <p>The day after an immigration judge, or in certain cases, the BIA, orders them excluded, deported, or removed (whether or not the decision is appealed).</p> <p>The only issue with that is that they should not accrue unlawful presence during the appeal process. this is for fairness.</p>	
<p>Lisa Jacobson Assistant Director of International Programs, DSO</p> <p>P: [REDACTED] F: [REDACTED]@ [REDACTED]</p>	<p>My name is Lisa Jacobson and I work directly with F-1 students as a DSO at Cascadia College in Washington state. It is my opinion that the proposed policy change for the calculation of accrued unlawful presence by nonimmigrant students and exchange visitors is excessively harsh and punitive. Specifically, on page 4 of the memorandum where F, J, and M nonimmigrants will now immediately begin to accrue unlawful presence after overstaying their visa, I-94 expiration date, or after the denial of an immigration benefit or violation of status. This seems very punitive and a direct attack on our country's education system.</p> <p>These students and exchange visitors are already some of the most regulated and tracked visa holders in the U.S. due to the SEVIS federal monitoring system and existing visa rules. I would recommend that USCIS and the Department of Homeland Security focus on enforcing the existing regulations instead of adding new restrictions on our students.</p>	
<p>Lauren DeBellis Aviv Attorney at Law</p>	<p>Please include the following to make your comments clear:</p> <ul style="list-style-type: none"> Refer to a specific portion of the memo - The fact that the proposed policy will have students 	

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Daniel Aharoni & Partners LLP [REDACTED] New York, NY [REDACTED] Telephone [REDACTED] Efax [REDACTED] www.danielaharoni.com	<p>accruing unlawful presence if they "violate their status" is draconian and cruel. This policy should not go into effect or there should be some sort of formal finding of violating their status (which they receive notice of) before the unlawful presence starts being accrued. FN 5 reads that a DHS officer can determine the date the student violated their status. It goes on to say "In accordance with 8 CFR 103.2(b)(16), if an adverse decision will result from a DHS officer's inadmissibility determination under INA 212(a)(9)(B) or INA 212(a)(9)(C)(i)(I), and that determination is based on derogatory information of which the alien is unaware, the officer generally will give the alien an opportunity to rebut that derogatory information." The words "generally will" do not demand that the officer confront the student with this information. It allows them to make a finding without notice to the student, and violates due process. The stakes are so high that it is absurd to not allow a student to have notice and respond to the allegations made against them.</p> <ul style="list-style-type: none"> • Explain the reason for any recommended change - In my law practice I often meet with students who are murky student visa issues. Sometimes they fall out of compliance and have to be reinstated into student status. Other times there are questions as to whether they are in compliance. To allow such a draconian result without clearer guidance and a "finite" finding against the student violates due process and will further alienate and discourage foreign talent from studying in the US. <p>I urge you to withdraw this policy, or in the alternative, clarify a mechanism under which the student has knowledge of the allegations against them and IS PROVIDED with an opportunity to respond before a finding against them and will start accruing the unlawful presence. To do otherwise is in a word - cruel!</p>	
Margaret C. Makar Colorado Atty # 0590 AILA member and former chapter chair mcmakar@aol.com	<p>Comment/Question/Point of Clarification: if per the memo above students start to accrue unlawful presence for failure to maintain status but such failure to maintain is not determined until an adjudication wherein for example a requested change of status may be denied for that reason, when does the time run from initial failure or from the determination - i.e. if not determined until a denied application will the accrual be retroactive leaving little time in some cases due to long adjudication to leave the US before accruing six months and a bar to reentry?</p>	
Shurong [REDACTED]@[REDACTED]	<p>I know you just issued a changing policy on Accrued Unlawful Presence by Nonimmigrant Students and Exchange Visitors. I just want to know if the 30-day grace period after J-1 expiration date is still valid currently? If I depart within one week after the expire date, will these several days be accrued as illegal overstay? According to previous policy, a J-1 exchange scholar can depart during grace period without leaving any bad record, I wonder if that is still the case? Thank you very much! I am looking forward to hearing from you!</p>	
Dinesh Hasija [REDACTED]@[REDACTED]	<p>I would like to make suggestion about one particular clause mentioned below:</p>	

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	<p>An F, J, or M nonimmigrant begins accruing unlawful presence, due to a failure to maintain his or her status¹⁰ on or after August 9, 2018, on the earliest of any of the following: The day after completing the course of study or program (including any authorized practical training plus any authorized grace period, as outlined in 8 CFR 214.2);</p> <p>I would suggest giving students <u>additional 30 days after completion</u> of course of study or program. Most of the students stay here over three-four years to finish their education, and it will be hard to leave the same day of completing the course work. Students have to attend graduation, and need additional time for packing and taking care of their apartments lease after they finish their graduation.</p> <p>Thank you and hope this suggestion helps you with policy formation.</p>	
<p>Dora Zhang <i>International Student Advisor, DSO</i> University of St. Thomas-Houston</p> <p>yzhang3@stthom.edu Phone: 713-525-3120 Fax: 713-942-3410</p>	<p>I would like to propose some revision in regards to the situations where F nonimmigrants do not accrue unlawful presence. I'm proposing these revisions because the new policy would have severe and unfair implications on F nonimmigrants who file reinstatement petitions after falling out of status.</p> <p>On page 10 of the Policy Memorandum, it lists the situations when "Foreign students (F nonimmigrant) generally do not accrue unlawful presence". I propose to revise "The period of time an F-1 nonimmigrant was out of status if he or she applies for reinstatement under 8 CFR 214.2(f)(16), provided that the application is ultimately approved;" by add to this item "If the reinstatement petition is denied, the individual starts to accrue unlawful presence from the day after the denial notice is issued." The new policy makes F-1 reinstatement an extremely risky petition for out of status F-1 students. Because the cost of travel for themselves and sometimes dependents, the long visa processing time in some countries, and the interruption of their study, many F-1 nonimmigrants choose to apply for reinstatement under 8 CFR 214.2(f)(16) when they are out of status. If the reinstatement is denied, the new policy will result in their accruing unlawful presence from the termination date of their SEVIS record. The USCIS website doesn't provide the current processing time for F-1 Reinstatement petitions. Based on our international student advisor community's experience, the processing time for F-1 reinstatement has been 9-12 months in the past year. Because of USCIS's long processing time of the F-1 reinstatement petitions, the new policy will result in more than 180 days or even one year of unlawful presents for out of status F-1 students if their reinstatement petition is denied and hence make them inadmissible to the U.S. to continue or complete their study. In some cases, students may complete their program before USCIS makes the decision on their reinstatement petition. The new policy will result in unlawful presence even if the student leaves the U.S. upon completion of their study after reinstatement is filed. Since 8 CFR 214.2(f)(16) allows out of status F-1 students to</p>	

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	<p>continue their study and regain their status, the new policy should not pose such an extreme risk for denials to deter students from choosing this status remedy.</p> <p>I hope USCIS can consider these revisions and avoid the new policy's contradiction of CFR regulation's intention to allow out of status F-1 students to continue and complete their study without extreme cost and interruption of their study. The new policy can make sense only if USCIS has a minimal processing time, which is not the case currently. F-1 students shouldn't be penalized when they have taken the action to file reinstatement. They should not accrue unlawful presence or become inadmissible because of USCIS's extremely long processing time.</p>	
<p>Makeda King-Smith Director, International Student Advisement Assistant Director, Admissions Pronouns: she, her, hers</p> <p>Cooper Union 30 Cooper Square, 3rd Floor New York, NY 10003</p> <p>makeda@cooper.edu 212.353.4192 phone 212.353.4342 fax</p>	<p>I am writing to submit comments to the draft policy memo for Accrual of Unlawful Presence and F, J, and M Nonimmigrants. Please see comments listed in bold under specific portions of the memo.</p> <p>Under section D, iii (Page 13) (ii) Denials Based on Frivolous Filings or Unauthorized Employment If a request for EOS or COS is denied because it was frivolous or because the alien engaged in unauthorized employment, the EOS or COS application does not protect the alien from accruing unlawful presence. The alien accrues unlawful presence as outlined in Chapter 40.9.2(b)(1)(E), Lawful Nonimmigrants. How will USCIS makes the determination of what EOS and COS applications are considered "frivolous," and how will that be denoted in a way that the non-immigrant is informed? This seems like an undefined and general statement which will allow capricious decisions about what is frivolous. It's such a subjective measure that would need to be standardized to ensure that it isn't abused.</p> <p>Page 10 Foreign students (F nonimmigrant) generally do not accrue unlawful presence in certain situations, including but are not limited to:</p> <ul style="list-style-type: none"> The period of time an F-1 nonimmigrant was out of status if he or she applies for reinstatement under 8 CFR 214.2(f)(16), provided that the application is ultimately approved;²⁹ <p>Students who are denied a reinstatement should not have unlawful presence accrue until the reinstatement is denied. This makes sense for two reasons. USCIS gives students 5 months to file a reinstatement application and they are taking more than 5 months to be approved. It is completely unfair to then penalize a student for staying in the U.S. while it's pending, and then call that time unlawful presence. Students are essentially required to remain in the U.S. while the reinstatement is pending or it will be denied. Additionally, there is an exception listed in the memo that says the following</p>	

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	<p>• While the F-1 nonimmigrant is pursuing a full course of study at an educational institution approved by DHS for attendance by foreign students, and any additional periods of authorized pre- or post-completion practical training, including authorized periods of unemployment under 8 CFR 214.2(f)(10)(ii)(E);</p> <p>If a student is pursuing a full course of study at an educational institution approved by DHS while the reinstatement is pending, why would that time when they are enrolled be counted towards unlawful presence. The student is still pursuing the full-time course of study and technically doing all the things required to maintain their status. This change really discourages reinstatement applications and instead encourages students to leave and reenter immediately after to regain F-1 status. That is a more expensive way to accomplish the same thing.</p>	
<p>Sarah Alami Sr. Intl Student Advisor, RO, PDSO Int'l Student & Scholar Svcs (ISSS)</p> <p>alami@gonzaga.edu PHONE + 1 509 313-5584</p>	<p>As a PDSO, RO, and as a citizen, I am concerned about the proposed policy for the following reasons:</p> <ul style="list-style-type: none"> · The distinction between an I-94 end date and D/S (the standard for F and J visas) is unclear, particularly due to the 30-60 day grace period to which they are entitled. · An unnecessary burden is placed on students and exchange visitors since they could be held irrevocably responsible for interpretation of policies made by institutions with regards to CPT, OPT, or other regularly updated USCIS regulations. · Dependents of F-1 and J-1 visa holders could be held responsible for the actions of the primary visa holder, regardless of any fault they may or may not have committed themselves. · These visa holders may have no way of knowing that they were considered to be unlawfully present in the US until much later. This denies students, exchange visitors, and their dependents, the protection of the legal process whereby a judge determines unlawful presence moving forward. · The distinction between violation of status and unlawful presence is key in protecting these visa holders from potential errors, particularly because it is unclear whether any recourse could be available. Although unlawful presence certainly should be met with bars, as stated in the memoranda, the distinction between <i>unlawful presence</i> and <i>violation of status</i> should be extremely clear. 	
<p>Bruce Gawtry Retired INS Officer (CIPRIS/SEVIS Design Team member and collateral duty INS School Officer)</p> <p>@ cell</p>	<p>The proposed application of a general, non-authority-driven unlawful presence policy (presently enforced only by a court or officer) is a direct contradiction to the use of D/S (duration of status) for international students and exchange visitors. D/S has been logically used for many years due to the long-term admission times, the variability of school programs and sizes, the ages of the participants, and the general need for flexibility in the attendance of students (whether of U.S. or overseas origin).</p> <p>Both D/S admission and only the court/officer supervisory determination of unlawful presence have</p>	


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	<p>long been useful protections for these special nonimmigrant classes. The FJM attendance in D/S status in school programs in the United States is currently encouraged and adequately supported presently by court/officer only applications of unlawful presence conditions.</p> <p>This new and over-reaching proposal for unnecessary tightening of unlawful presence guidelines will be damaging to the entire U.S. international education program, both in its direct threat to international students and exchange visitors, and in its negative impact on the image of openness and welcoming availability of a great education in America.</p> <p>I recommend withdrawing the proposed memo on Accrual of Unlawful Presence for FJM Nonimmigrants.</p>	
Robin Catmur-Smith Director, Immigration Services, UGA 	<p>This radical change to the policy of when international students accrue unlawful presence (UP) seems overly punitive. By stating that UP will begin to accrue the day after the violation, when in many cases the student might not even be aware of the status violation until months or years later when applying for a new benefit, you may be putting the students in a situation where they will not have the option of departing before reaching a point where the bars to re-entry are applied. A student's D/S authorization is **very* different from a date certain expiration. There is no question if a person remains beyond a date certain I-94 end date, but there are many grey areas when it comes to a student's status maintenance.</p> <p>At a time when we should be encouraging policy interpretation to make it easier for international students to come to the U.S., your policy interpretation is making it harder.</p>	
K.C. McAlpin Executive Director US Inc. 	<p>We strongly support the May 10, 2018, U.S.C.I.S. policy change for calculating the time for accruing unlawful presence for student (F non immigrant), exchange visitor (J non immigrant), or vocational student (M non immigrant) visa holders who have violated the terms of their non immigrant visas.</p> <p>The announced policy change is long overdue as a matter of law and common sense. Those holding F, J, and M non immigrant visas are fully informed and aware of the date on which their visas expire, and they know when they should depart from the United States.</p> <p>But many purposely and willfully fail to leave by their departure date, and the widespread violation of the terms of their temporary visas is the reason an estimated 40 to 50 percent of the entire illegal alien population in the United States consists of visa over-stayers.</p>	

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	<p>The special interest lobbies who generally oppose the enforcement of our immigration laws often point to the dispirit treatment of visa over-stayers and those who attempt to enter the U.S. illegally across our southern border as alleged evidence of racism or bigotry. This policy change will help to address that issue.</p> <p>The violation of non immigrant visa deadlines breeds disrespect for the rule of law, and tells millions of legal immigration applicants that they are fools to obey our laws.</p> <p>This policy change represents a small, but important step in correcting this injustice, and we applaud the Department's move.</p>	
<p>Kathy Kautz de Arango EXECUTIVE DIRECTOR OF INTERNATIONAL AND MULTICULTURAL PROGRAMS AND SERVICES University of New Haven [REDACTED], West Haven, CT [REDACTED]</p> <p>T: [REDACTED] F: [REDACTED]@[REDACTED].[REDACTED]</p>	<p>I am a PDSO at the University of New Haven, with an approximate population of 1200 international students, including those on optional practical training. International students are more than 10% of our student population and represent a significant income. I am making a comment based on the typical workings of international student services at this University and at many other schools who follow best practices and comply with federal regulations for F-1 and J-1 academic students. I do not have experience with M-1 students.</p> <p>The new definition of unlawful presence according to policy proposal PM-602-1060 will have a significant and negative impact on international students as well as on the schools who enroll them. The negative impact on the F-1 and J-1 students makes the U.S. even more unwelcoming for international students and could affect University tuition income, which is the keystone to most schools' budgets. Local communities also benefit from international students who are consumers and provide income to local businesses. We could also lose currently enrolled students who inadvertently fall out of status. My comments are as follows:</p> <ol style="list-style-type: none"> 1. The new definition takes away any due process for students to appeal, file for reinstatement, or take other recourse because they become immediately deportable instead of withholding penalty until after adjudication or as decided by a judge. Technically the US government would be saying that students (and other non-immigrants) lawfully present in the US on valid visas have no rights. They have no redress should their SEVIS record be terminated by a naïve mistake or by administrative error. Nor is there any consideration for the hardship this would cause them. Hardship has long been a consideration in reinstatement applications. 2. For students who withdraw from credits mid-semester and fall below full-time enrollment, their 	

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	<p>SEVIS records must be terminated at the time of withdrawal. They currently have an eligibility window of five months to file for reinstatement, which gives time for them to complete the semester and rectify the situation. They also have the option of going home and restarting the visa process with a new I-20 without triggering a bar that would prohibit their return to the U.S. I believe this is a fair treatment for young students who make understandable mistakes and who otherwise pose no threat to society.</p> <p>3. Currently, the regulations allow for up to 6 months of unlawful presence until a 2- or 3-year bar is applied to re-entry. After one year, a 10-year bar is applied. The new policy proposes a permanent bar to re-entry to the U.S. This would be a particularly harsh penalty for a young student who dropped a course because a friend or professor said just drop the course so your GPA isn't affected. Because grade point averages (GPA) affect such things as scholarship approvals and even academic dismissal, they become powerful motivators, but unlike domestic students, international students don't have the ability to drop courses without affecting their visa status.</p> <p>4. There is a discrepancy in the logic that if a student drops below full-time and goes out of status, they would be no longer pursuing their course of study. The concept of "pursuing a course of study" in this proposed policy is out of line with what the University sector deems as pursuing a course of study. The language as it is proposed would really only apply to a student who fails to enroll in the subsequent semester, and the current regulations around visa overstay in this scenario are already adequate as they are.</p> <p>5. The regulations around visa overstay are currently adequate to remove unwanted individuals and to bar those with criminal offenses. Visas can be revoked now for many offenses including driving under the influence. The SEVIS system immediately identifies violations of status, so there is no problem tracking those students who could potentially overstay their visas. However, students and university personnel must be given a window to work with students and help them get back on track in order to retain them and maximize their success.</p> <p>6. If the regulations are currently adequate, then the only reason to be more restrictive would be for political appeal. To counteract visa overstay among international students, it could be more effective to increase communication between local DHS agents and Universities to allow DSOs to help students file for reinstatement instead of having them fall off the grid.</p> <p>7. About DACA students. The sunset of the DACA program forced many undocumented students into unlawful status that can now be counted back many years based on the evidence they submitted with</p>	

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	<p>their I-821 application. Under the new policy, these students could be immediately deported and assessed with a permanent bar to never again return to the US, which is the only country they have known and identify with. Additionally, undocumented parents of U.S. citizen children or spouses could be immediately deported and permanently barred from return even though they have been law abiding and contributing positively to their local communities. This separates families and throws them into economic difficulty.</p> <p>8. The policy proposal does not distinguish between an otherwise law-abiding non-immigrant here on a valid visa and an unwanted criminal, terrorist or gang member. There is no priority of enforcement.</p> <p>Please consider these points from the perspective of the University community. Thank you.</p>	
<p>John Rohe [REDACTED]@ [REDACTED]</p>	<p>This support for the Policy Memo is respectfully submitted within your 30-day comment period. On May 11, 2018 the Wall Street Journal addressed this Policy Memo in an article entitled "Trump Administration Seeks to Tighten Student, Exchange Visa Oversight." This article describes the change as follows:</p> <p>"Under the old rules, which date back to 1997, the government begins counting the days someone is in the country without authorization when the violation is discovered. Under the new rules, which are to take effect in 90 days, the clock would be set back to when the visitor first fell out of compliance."</p> <p>This proposed policy change makes sense. Anyone entering the country on a visa has sufficient information to understand the terms of their authorized visit. It would be impossible to assume a temporary visa is perpetual.</p>	
<p>Megan Kohr Coordinator for International Student and Scholar Services</p> <p>Center for International Education Upper Iowa University</p> <p>Phone: [REDACTED] Email: [REDACTED]@ [REDACTED]</p>	<p>Referencing Page 4 under section "<i>F, J, or M nonimmigrants who failed to maintain nonimmigrant status on or August 9, 2018</i>" bullet 1:</p> <ul style="list-style-type: none"> - Recommendation: The policy remains as is currently written in the previous policy guidance in the USCIS Adjudicator's Field Manual 40.9.2 - The proposed policy change assumes an F, J or M nonimmigrant knowingly or should immediately be made aware when they have violated their status. However, they may not become aware of that violation until potentially years later at which point they'll learn that they've been barred from the U.S. for up to 10 years. If they don't even know that they have violated a status, how can they possibly ensure that they leave or submit a reinstatement application prior to having that bar be imposed? <p>Cases of reinstatement or change of status denials also concerns me because the student otherwise made a timely application, but due to USCIS processing times, the rendering of the reinstatement or change of status decision could easily exceed the 180-day period after which the 3 or 10 year bar is imposed.</p>	

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	<p>Additionally, there is much gray area when it comes to OPT employment because the determination of what is considered to be appropriate employment (in accordance with the "related to field of study" provision) as well as the allowed number of unemployed days is not made by the Designated School Official overseeing their SEVIS record. Nor is there any formal review process of the employment by USCIS, SEVP, or any other DHS organization that would promptly confirm the compliance of the specific employment opportunity. This is hugely unfair to an F nonimmigrant because they may accept an employment offer in good faith believing that it meets the regulatory requirements but have no means by which to verify that. See SEVP OPT Policy Guidance 1004 – 03 Sections 7.4.3 and 7.2.4 for the guidance regarding the DSO role in employment verification.</p> <p>Finally, it's draconian to penalize an F, J, or M nonimmigrant for a decision made by the Designated School Official in regards to CPT situations. The federal immigration regulations are pretty open to interpretation and have a lot of gray area when it comes to what can constitute CPT. That leaves DSOs to make determinations based on the policy guidance available and the advice of the Field Representatives or SEVP. If a DSO makes a good faith effort to interpret the immigration regulations and apply them appropriately to their school's individual and the student's individual situation and an USCIS adjudication officer holds a different interpretation of the regulations that contradicts the DSO's decision, the student is the one paying the price. It is incredibly prejudicial to the student to now bar them from entry to the U.S. for years at a time after they otherwise followed the regulations and maintained their status.</p> <p>Referencing Page 5 under the same section as above but referring to the F-2, J-2 or M-2 nonimmigrant dependent:</p> <ul style="list-style-type: none"> - Recommendation: Again, the policy should remain as is currently written in the previous policy guidance in the USCIS adjudicator's Field Manual 40.9.2 - This again unfairly affects the dependent for the conduct or circumstance of the principal F, J or M nonimmigrant. It is draconian to then prohibit the child or spouse of the F, J or M nonimmigrant from being able to reenter the U.S. for their own interests for pleasure, education, or whatever. Effectively, this new policy guidance punishes the child for the sins of the father. <p>I hope that these situations demonstrate the prejudicial and severe nature of the proposed policy change and a return to the old policy is made.</p>	
Mexican Embassy	<p>1) Could you explain the new policy for these two cases?</p> <p>a) "The day after they no longer pursue the course of study or the authorized activity, or the day after</p>	

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	<p>they engage in an unauthorized activity” b) “The day after completing the course of study or program, including any authorized practical training plus any authorized grace period”</p> <p>2) Could you share an update on the number of applications received and if there are any changes in the policy regarding processing?</p>	
<p>Brandon Chauvin </p>	<p>The changes that this administration are making in order to target potential and current “intending immigrants” and visa overstayers are greatly appreciated. However, these changes do not truly attack the root of the problem. Consequently, while Mr. Cissna’s message is spot on, it fails to truly understand the main allure of obtaining nonimmigrant, temporary visas (NIV) and subsequently overstaying: ADJUSTMENTS OF STATUS (I-485) and the prospect of finagling a green card.</p> <p>As Jessica Vaughan wrote in her article (https://cis.org/Shortcuts-Immigration-Temporary-Visa-Program-Broken), such nonimmigrant visas operate in part as a “gray-market alternative” to the immigrant visa (IV) program. If attempts to severely restrict adjustments of status are not considered and implemented, the line between IV and NIV will continue to dim. The status quo will further continue undermining our immigration system. As USCIS statistics have shown, over 90% of adjustment of status applications have been approved.</p> <p>We had 10.4 million visitors on nonimmigrant visas in FY 2016:</p> <p>https://travel.state.gov/content/dam/visas/Statistics/AnnualReports/FY2017AnnualReport/FY17AnnualReport-TableI%20.pdf</p> <p>The point is: there are clear distinctions between NIVs and IVs. Just about anybody can obtain any category of nonimmigrant visas. The same can't be said for those looking to obtain an immigrant visa.</p> <p>To truly target visa overstays and strongly discourage people from overstaying in the future, the Director (USCIS) must immediately look into adjustments of status and proceed accordingly from there with our Attorney General. Not doing so could potentially render the changes to how unlawful presence is calculated pointless.</p> <p>To add onto what I've written, a change in the calculation of unlawful presence will do little to discourage overstaying visas with our visa issuance rates so astonishingly high. In fact, consular</p>	

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	<p>officers are doing little to adhere to Section 214(b) of the Immigration and Nationality Act. It stipulates that ALL applicants will be presumed to be an "intending immigrant." Failing to overcome that would "theoretically" warrant a denial 100% of the time.</p> <p>https://travel.state.gov/content/travel/en/legal/visa-law0/visa-statistics/nonimmigrant-visa-statistics/monthly-nonimmigrant-visa-issuances.html</p> <p>Visa issuance standards are so low that it is almost an invitation to the world to obtain said visas and to do whatever it takes to finagle a green card once here.</p> <p>The solution: speaking with our Director so that he can communicate with his State Department and DHS counterparts about the need to STRICTLY ENFORCE 214(b) of the law. By strictly enforcing it, we will send a resounding message.</p>	
Bill Teeter [REDACTED]@[REDACTED]	I support the proposed changes to penalize those that overstay their visas. Too many people in the IT industry are out of work. These visas provide an easy means to displace older American workers.	
Judy Harnett [REDACTED]@[REDACTED]	New policy proposal is fantastic. We need to stop visa overstays. People keep taking advantage of the generosity of this country. I am on board with this policy.	
Alex Wing a [REDACTED]@[REDACTED]	<p>Excellent initiative by the USCIS and DHS. f1 students (IT consultants with fake resume) who are not getting H1B and are done with their OPT, joins some of the universities just to get CPT from day 1, which is not legal, but, till now nobody was objecting this and these students were successfully using this loophole to continue working. F1 is a non immigrant visa and you have to go back to your home country once you are done with your education and are not able to get another visa like H1b.</p> <p>Thanks to the officials who drafted this memo, we stand by you and very thankful to stop this visa abuse, so that Americans who are educated and deserving will get these jobs.</p>	
Tom O'Brien Director of Business Development [REDACTED]@[REDACTED] Hauppauge, NY [REDACTED]	<p>With regard to this important topic, I sincerely hope we do not lose focus on what then candidate Trump stated during the campaign, which to paraphrase – “why would we want to let highly educated foreign students, that have earned advanced degrees at our US Colleges and University leave, only to have them leave to compete against us?.” This is especially important to our country in area of high technology.</p> <p>I work for a small business that provides machine vision measurement and inspection technologies for the railway industry. We are fully US based and on average, about 70% of what our company designs, develops, and manufactures is exported. We have about 500 systems in 32 countries and while we</p>	

STAKEHOLDER/ ORGANIZATION	STAKEHOLDER COMMENTS	ORIGINATING OFFICE'S RESOLUTIONS
	<p>only have about 50 people, our staff covers about 13 different languages to support this effort.</p> <p>Sadly, as a country the US has fallen behind the world in math and the sciences. Foreign students have in many case been able to fill that important technology vacuum. That intellectual resource is <u>strategic to the strength and growth of our US Technology Base</u>; no different than Grumman and Sikorsky were to the field of aviation and German immigrants were for the tool and die industry in the 20th Century for the US. We are truly in a <u>period of re-industrialization</u> in the USA, having lost so much of our manufacturing to overseas factories. Of greatest concern is as our manufacturing has departed, the US lost much of our need for US design engineers, US manufacturing engineers, US test engineers, and US scientists. This very dangerous progression of events must stop, a positon with which I am certain the President would fully agree.</p> <p>Our visa and immigration system must be both flexible, as well focused on keeping such vital human resources available to rebuild and grow US economy. <u>We do not want to throw the baby out with bathwater.</u></p> <p>While not immediately related to overstaying, our current lottery system for H1-B visas, should be changed to a merit based approach. In other words, what valuable skills can that individual provide to the US to improve our technological and economic growth.</p>	
Krishna Bandaru [REDACTED]@[REDACTED]	<p>With regards to New Memo proposal on F-1/CPT:</p> <p>I'd like to request USCIS on behalf of many Talented young F-1/CPTs</p> <ul style="list-style-type: none"> • This should not effect precious cases (existing ones before the memo date). • Since Universities are constantly updating USCIS about a student's SEVIS, there's no point in questioning the presence. 	
Aaron Voorhies [REDACTED]@[REDACTED]	<p>This rule should not be effective anytime. It violates students to study in the US. Nobody will come to US for study. I will not be investing in house or in future if this thing gets appllied. I would gladly go Canada and invest my income there. Please stop this rule.</p>	
Sandeep Reddy [REDACTED]@[REDACTED]	<p>This is very unfair, people who come to US will have big dreams and day by day the situations are becoming worse. When we start planing for higher education the first thing that comes in our mind is US. We believe that studying in USA is pride for us. But now, people are scared to step in US because of these restricted policies. But people who already came USA, for them it is like a do or die situation. The rule which they wanted to implement from August -09-2018, is not at all fair because there are many students who are on CPT, because of many reasons like lottery , OPT stem Ext denials etc.,</p>	

STAKEHOLDER/ ORGANIZATION	STAKEHOLDER COMMENTS	ORIGINATING OFFICE'S RESOLUTIONS
	Please support us and do the needful thanks.	
Sabharish Sainath [REDACTED]@ [REDACTED]	This is unfair to call people unlawful who are paying fees studying and paying taxes. If this is not lawful then please take action on colleges which offer CPT. Please save us from taking wrong steps if colleges are doing something wrong.	
VEERA VENKATESWARA RAO YERAJERLA [REDACTED]@ [REDACTED]	Hello, I am Veera Yerajerla. I am pursuing masters in Information Technology Management. we didn't get a proper knowledge by one year of my Optional practical training period and also we didn't get any STEM OPT for the loss of ACICS accreditation with DEPARTMENT OF EDUCATION OF United States and we are here and paying lot of fee to obtain some practical knowledge in our industry but if this new proposal of CPT will happen like this, we even didn't get a proper knowledge that may doesn't help in my country to survive and get into the job. So Please please don't issue a new policy of CPT rules.	
T. Aswani Kumar Reddy [REDACTED]@ [REDACTED]	Please please don't implement this rule. This will effect lots of students.	
Pravallika Manduva [REDACTED]@ [REDACTED]	I have gone through the MEMO which was recently proposed regarding CPT, I am a student of Northwestern polytechnic University(NPU,Fremont, CA). During my last semester 12 December 2016, there was a notice saying that my college has lost accreditation, which was one week before for the completion of my master's. We are supposed to get opt extension, we should file H1 in master's quota and no recognition for our degree on which we have waste lot's of time. We did not get any student benefits. Now my college got accreditation after transferring my SEVIS to new college. And now a new rule regarding CPT came. we did not get opt extension as different college students and now a new rule on day 1 CPT. if you want to implement the rule please give the OPT extension as our college got accreditation.	
Sandy Varma [REDACTED]@ [REDACTED]	I completely disagree with the new rule that proposed by USCIS. foreign students those who came to USA with so many hopes will completely upset with the new rule. USA government closing all the doors for the students to work in USA. not giving proper OPT, STEM OPT's and H1-B's for the students. we came to USA with so much of hope and we worked so hard to complete our masters and getting jobs on tough completion with the people those who came to USA on H1-B. i don't understand why USA government changing rules for only Students those who came to USA on F1. I think USA government should give high priority to F1 students than H1-B and H4 visas. my situation I came to USA 5 years ago and completed my masters in 2 years and worked as a full time for american	

STAKEHOLDER/ ORGANIZATION	STAKEHOLDER COMMENTS	ORIGINATING OFFICE'S RESOLUTIONS
	<p>based company and i have applied for H1-B 3 times but my application never got picked up because of heavy competition of outsourcing companies. I stopped working and doing my PHD in a good reputed college. with the newly proposed rule i should leave the country on the middle of my studies. it is completely unfair. USA have really good universities and offers good education system please allow people those who want to study i will never decrease your economy or increase un employment.</p> <p>Please think twice before changing the rules.</p>	
<p>Malathi Gattagalla [REDACTED]@ [REDACTED]</p>	<p>I did my masters in a college which suddenly closed and even before i could finish my Opt i had to join another college for status. My opt i got in August 2017 and my college closed in December i could not use my opt even for 6 months whereas its valid for a yr and can apply for extension.As i was working already i had no option but take day 1 cpt to continue working. They cannot do this injustice with students we though take a day1 cpt we still pay the college fee and also attend our classes. How can that be incorrect.</p>	
<p>Arjun Bollam Application Developer [REDACTED]@ [REDACTED] Ph.No: [REDACTED]</p>	<p>I am composing this mail in response to the new policy memorandum made by USICS stating that when unlawful presence kicks in,students working on Day one CPT will be considered as illegal immigrants.I strongly support this policy and urge you to to go forward in implementing it.This will prevent H1B abuse and other unauthorized activities made by the students and consulting firms.</p>	
<p>Chandrasekhar [REDACTED]@ [REDACTED]</p>	<p>I have read the memo and i am completely against these rules in the memo. I 100% deny this memo. I am F1 visa holder and this rule effects millions of students across the US and their families. You can keep out bad people or even students who did bad things from your country.</p> <p>But don't go harsh on students, they are not killers or drug smugglers or they don't hurt anyone. They will pay 3 times higher fees, pay higher taxes, just work for 20hrs/ week on campus for their food. They will generate economy by living here and help to grow the country.</p> <p>Please be reminded any rule that you make will effect millions of families and people around the world.</p> <p>I urge not to change any of the rules. Please be respectful towards legal immigrants.</p>	
<p>Divya Ramisetty [REDACTED]@ [REDACTED]</p>	<p>We don't understand why this is happening only to us. Most of us come from poor families with the help of loans and lots of dreams that we will study abroad, gain knowledge and work good to bring out our family from the poverty zone. But that is not the case here, after using up our loan for the first master's because the accreditation of our school is now gone, to stay and work legally we are having to</p>	

STAKEHOLDER/ ORGANIZATION	STAKEHOLDER COMMENTS	ORIGINATING OFFICE'S RESOLUTIONS
	<p>join another school for CPT an pay half of our salaries for the school fees and the remaining for our living expenses, without being able to clear a single penny from our loan or send to our parents and we ourselves are living in poverty here.</p> <p>Meanwhile, from the past three years, our parents who are hoping that some day we will succeed, are just growing old day by day but we're not getting any justice. As I type each word of this email with tears rolling in my eyes I sincerely plead to the USCIS not to take such a drastic step which would crores of student's lives and leave them in debts which they would never be able to clear.</p> <p>After all, apart from the loan, they have even spent their entire life savings for our education, just thinking that it would give us a good life. And now, if I don't work and fetch for the family how will we all survive ? How will I feed them ? How will I pay their medical bills for their well being and long lives ? Is this the final conclusion for all their hard work their entire lives. We already are in lot of debts. Please help us get the refund of our first Masters and let us work on CPT legally. Please we beg you. Please understand the pain and agony we are going through all these years and still leading the same poor lives.</p>	
Naga Harikrishna [REDACTED]@[REDACTED]	I do not support this law as this does not provide chance to all students who want to pursue another master's degree after completing one. Change of College depends on individual case, as it might be effected by environment or in pursuit of passion towards USA education. I sincerely request to revert this law, so all the immigrant students can stay and study happily ever in USA	
Atif Uddin [REDACTED]@[REDACTED]	As an international student i have paid my fees, taxes etc everything on time and continue to be good foreigner by adhering to the laws of the land and helping out with taxes etc. The only thing i or any other student ask is a student friendly regulation which helps in building an exceptional tech professional, the same professional in future will be an asset to this country. Therefore in the interest of bright future of this great country i request you to please not pass this rule.	
Sindusha Reddy [REDACTED]@[REDACTED]	<p>I strongly feel that status of F-1 students enrolled in same level of degree for a different course after successfully completing one course of study, often considered as an extention of the completed course of study, should not be considered as unlawfull .</p> <p>It could alway be the choice of the student to continue the education in extended field most times with same level of degree. A curricular practical training is often required for a contunied learning experience which is important for career growth.</p> <p>Hence, pursuing same level of graduate education may not be considered unlawful, and services of</p>	

Accrual of Unlawful Presence and F, J, and M Nonimmigrants

Stakeholder Comments Matrix

STAKEHOLDER/ ORGANIZATION	STAKEHOLDER COMMENTS	ORIGINATING OFFICE'S RESOLUTIONS
	<p>highly qualified and skilled foreign students should be supported for economic growth contribution.</p> <p>I agree that it must be enforced that any non immigrant F1 student maintain a valid immigration status at all times, but imposing a ban on a student with valid I20 pursuing graduate education, would be loosing a valued and skillfull immigrant.</p>	
Maty John [REDACTED]@ [REDACTED]	<p>I have seen a news on your unlawful presence. The students who were completed OPT (optional practical training) as they were staying legally according to norms of SEVP and DHS rule by doing there post masters involving them into this unlawful presence is not accepting please help us in some way where we can overcome this issue or keep aside of us from this unlawful presence where we are paying regular taxes along with the fees to the University also without any.</p> <p>Hopefully you understand our situation and make some help to all the people who are suffering from this issue will be much appreciated.</p>	
Arjun Reddy [REDACTED]@ [REDACTED]	<p>This rule can effect lot of students life who are pursuing master degree in US. this rule can impact of lot of students dream on US. this rule is not useful to any of students or employee's. so please don't approve these type of rules.</p>	
Dheeraj Reddy [REDACTED]@ [REDACTED]	<p>This is not fair for students we came here for good career and good opertunitys and we are not doing unlawful things but to save our status we are taking cpts but please give us a chance to remain here. We are not doing any unlawful things or we are not bothering anybody. We have so much loan in our home country at list to get rid of that please give us some more time like one year not more than that.</p> <p>I graduved from NPU which its lost its accreditation after the complition of my course so that i got only one year OPT so that i joined other clg to maintain my status.</p>	
Rahul Ravi [REDACTED]@ [REDACTED]	<p>Any rule or policy when implemented should never effect the students. it makes a technology drain and shuts off the creative thoughts. If the student wants to study and apply the same knowledge practically then there should not be any restrictions on it. This will help to create more thoughts which drive in creating new jobs which will help to boom the economy .so please take these factors into consideration and allow students to continue working and make this rule exist.</p>	
Manoj Kumar [REDACTED]@ [REDACTED]	<p>Higher degree will help to explore and gain more knowledge to F1 student which will help to bring up his/her career.</p> <p>At the same time CPT/OPT is needed to get practical knowledge by working with international clients.</p>	
RAJ NALLA [REDACTED]@ [REDACTED]	<p>I will be suffered if the rule is passed, this is second masters. My first master college has no accreditation so I have done my masters program and I have shifted to second masters where I was</p>	

STAKEHOLDER/ ORGANIZATION	STAKEHOLDER COMMENTS	ORIGINATING OFFICE'S RESOLUTIONS
	unable to offend fees so I was trying to find new technical job using my cpt rights. Now if the rule is passed where would I get money from. My first college accreditation is no more now no cpt for me I can't believe it. Please don't pass it. Not only me many students will be suffered.	
Priya G. [REDACTED]@[REDACTED]	<p>I think this memoranda should be modified as it affects a lot of young students who invested a lot of money in their education here in America to advance their career. Due to the fact that America has one of the best education systems, many students dream to come to this country to follow their dreams. Optional Practical training is given to all F1 students on their STEM degrees, but is 3 years the right tenure to follow their dream jobs after having spent their fortune on the education? An average American takes about 8 years to pay off their education loans. Why would an international student be treated differently? Blame H1B's lottery system? Every immigrant should be admitted into this country from now on based on the eligible criteria (in terms of skills, GPA, English speaking test scores) and not based on the lottery VISAS.</p> <p>I agree that the students who come to the country should leave immediately once the purpose if fulfilled but what if they choose another degree? They should be allowed to pursue their dreams, and this international education with the option of having OPT/CPT expands the economy in a good way. A student seeking another degree if their H1B is not picked up in the lottery is not a sin, it's their dream and sometimes it's their need. With the current document, it is understood that the students who pursue various degrees with CPT/OPT on their education level is considered illegal. This should not be considered as "overstay" as they obtained another lawful immigration status by joining an accredited university, paying tuition fee and pursuing their degrees. If this is unlawful, then there will be hundreds of thousands of immigrants (Green card holders, H1B holders, EAD card holders, Citizens), who will be at stake. Propose new changes from now on that benefits good students and ask universities to not allow intake of international students for their dual degrees. Student immigrants should never be considered unlawful/illegal unless they commit serious crimes/not maintained their legal status/violate their status by working off-campus. In this country, a person at their 40 years of age could take up for example, MBBS degree and change their career path if they are willing to. Why not an international student do the same? Any student should be able to take up another degree if they are willing to. There should be freedom to pursue their education. With Practical Training (OPT/CPT), it allows students to experiment/show their abilities with their career paths. The real problem of illegal immigration is not changing the legacy system, but instead building on top of the already broken one which leads to unexpected problems.</p>	
Kranthi Reddy [REDACTED]@[REDACTED]	<ul style="list-style-type: none"> • Page 1 • Day 1 CPT is meant for acquiring more knowledge in a specific field whether it is a Information Technology or Engineering, it is not meant for misusing and i think USCIS got it 	

STAKEHOLDER/ ORGANIZATION	STAKEHOLDER COMMENTS	ORIGINATING OFFICE'S RESOLUTIONS
	<p>completely wrong.</p> <ul style="list-style-type: none"> USCIS should once again consider on revoking this kind of policy which effects many students who are dreaming of pursuing education which is not available in their home country. <u>NEGATIVE EFFECTS BY IMPLEMENTATION OF THIS POLICY</u> <ol style="list-style-type: none"> Students will not have access to quality education. Students who are pursuing education in CPT may loose all their investment they did in their education. Discouraging those students who wants to pursue and develop their career will be seriously effected with this policy. <p>USCIS Should consider revoking this policy as soon as possible.</p>	
Anudhanaram Eelaprolu [REDACTED]@ [REDACTED]	<p>This is one of the most critical rule for the students who wants to use the CPT. No one is supporting this rule including myself. can you please stop bring this kind of rules.why because this kind of rules spoiling the lot my peoples bright features, and by bring this kind of rules lots of people who are using and who are going to use, all of these are getting into mental depression. Please kindly take my response into consideration.</p>	
Heather M. Stewart Counsel and Director of Immigration Policy, Public Policy NAFSA: Association of International Educators [REDACTED] Washington, DC [REDACTED] (T) [REDACTED] (F) [REDACTED] [REDACTED]@ [REDACTED]	<p>Attached, please find the comment letter from NAFSA: Association of International Educators in response to the USCIS Policy Memorandum: Accrual of Unlawful Presence and F, J, and M Nonimmigrants.</p> <p>Please contact me by phone ([REDACTED]) or email ([REDACTED]@ [REDACTED]) if you have any questions.</p>	
Vincela Reddy [REDACTED]@ [REDACTED]	<p>Please do not pass this memo as we will lose the opportunity to study courses once we graduate with a Masters degree. Working while pursuing masters is not a crime.</p>	
Manivas [REDACTED]@ [REDACTED]	<p>I respectfully disagree with the above stated opinion or message as there is no where in the above stated memo has laid down instances where one is considered unlawfully present.</p> <p>If we interpret or opinionate on an speculation what USCIS may deem or do based upon the language written in the memo, then it is impossible to determine what are the circumstances and facts may be considered for explaining individuals when they are in legal status and when they are not. If we indulge or agree with this kind of interpretation of memo, I see grave danger to STEM OPT Students who are working at third party client sites rather than the students who are working on authorized CPT</p>	

STAKEHOLDER/ ORGANIZATION	STAKEHOLDER COMMENTS	ORIGINATING OFFICE'S RESOLUTIONS
	<p>after completion of their first degree while pursuing their second degree in the United States.</p> <p>The whole confusion of the issue of determining when student can be considered accruing unlawful presence is caused because of the following:</p> <p>“When assessing whether an F, J, or M nonimmigrant accrued unlawful presence and was no longer in a period of stay authorized, the USCIS officer should consider information relating to the alien’s immigration history, including but not limited to:</p> <ul style="list-style-type: none"> • Information contained in the systems available to USCIS; • Information contained in the alien’s record and • Information obtained through a Request for Evidence (RFE) or Notice of Intent to Deny (NOID), if any. The officer should follow current USCIS guidance on the issuance of RFEs or NOIDs” <p>However, this should not be read alone but along with the other parts of the memo where it clearly states what conditions shall lead someone to be considered out of status. Or accrued unlawful presence.</p> <p>Memo clearly laid down, who are considered unlawful right above the above stated info what officers must look into to determine whether someone is out of status and accruing unlawful presence. Memo clearly lays down the following:</p> <ol style="list-style-type: none"> 1. The day after DHS denied the request for an immigration benefit, if DHS made a formal finding that the alien violated his or her nonimmigrant status while adjudicating a request for another immigration benefit; 2. The day after the Form I-94, Arrival/Departure Record, expired, if the F, J, or M nonimmigrant was admitted for a date certain; or 3. The day after an immigration judge or, in certain cases, the Board of Immigration Appeals (BIA),⁹ ordered the alien excluded, deported, or removed (whether or not the decision is appealed). 4. F, J, or M nonimmigrants who failed to maintain nonimmigrant status on or August 9, 2018. An F, J, or M nonimmigrant begins accruing unlawful presence, due to a failure to maintain his or her status on or after August 9, 2018, on the earliest of any of the following: <ol style="list-style-type: none"> 1. The day after the F, J, or M nonimmigrant no longer pursues the course of study or the authorized activity, or the day after he or she engages in an unauthorized activity; 2. The day after completing the course of study or program (including any authorized practical training plus any authorized grace period, as outlined in 8 CFR 214.2); 3. The day after the Form I-94 expires, if the F, J, or M nonimmigrant was admitted for a date certain; or 4. The day after an immigration judge or, in certain cases, the BIA¹¹ orders the alien excluded, deported, or removed (whether or not the decision is appealed).” 	

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	<p>Also, foot note 7 and 8 of the memo, clearly states the following: Foot note 7: "An F, J or M nonimmigrant who failed to maintain status before the effective date of this memorandum and remains in the United States without maintaining lawful status is generally present in violation of U.S. immigration laws. Nevertheless, if DHS makes the inadmissibility determination under INA 212(a)(9)(B) or INA 212(a)(9)(C)(i)(I) on or after August 9, 2018, unlawful presence for such an alien begins accruing on August 9, 2018 and may continue to accrue for as long as the alien remains in unlawful status in the United States, unless the alien is or becomes otherwise protected from accruing unlawful presence, as outlined in this AFM Chapter 40.9.2."</p> <p>Foot note 8: "Note that the policy for determining when unlawful presence begins to accrue remains unchanged for F, J, and M nonimmigrants for whom DHS made a formal finding of violation of nonimmigrant status before August 9, 2018."</p> <p>Hence, I strongly disagree if someone states that students who are working on CPT authorization after completion of one degree while they are pursuing second degree are considered out of status and accrue unlawful presence provided such CPT authorization is proper and the student is properly complying with those regulations.</p> <p>I fear this memo is more problematic to the students who are working on the STEM OPT authorization at the third party client sites rather more of the CPT students after first degree completion as the later group is lawfully authorized to work but the former is not as per the regulations.</p> <p>But I strongly believe as lawyers and as employers one has to assess on case by case basis before we conclude that certain group of individuals are in legal trouble.</p> <p>This is my opinion and my view of the memo issued by the USCIS.</p> <p>As said, I respectfully disagree with any other interpretation of the stated memo</p>	
Brandon Chauvin [REDACTED]@[REDACTED]	<p>The changes that this administration are making in order to target potential and current "intending immigrants" and visa overstayers are greatly appreciated. However, these changes do not truly attack the root of the problem. Consequently, while Mr. Cissna's message is spot on, it fails to truly understand the main allure of obtaining nonimmigrant, temporary visas (NIV) and subsequently overstaying: ADJUSTMENTS OF STATUS (I-485) and the prospect of finagling a green card.</p>	

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	<p>As Jessica Vaughan wrote in her article (https://cis.org/Shortcuts-Immigration-Temporary-Visa-Program-Broken), such nonimmigrant visas operate in part as a “gray-market alternative” to the immigrant visa (IV) program. If attempts to severely restrict adjustments of status are not considered and implemented, the line between IV and NIV will continue to dim. The status quo will further continue undermining our immigration system. As USCIS statistics have shown, over 90% of adjustment of status applications have been approved.</p> <p>https://www.uscis.gov/tools/reports-studies/immigration-forms-data/data-set-form-i-485-application-adjustment-status</p> <p>To truly target visa overstays and strongly discourage people from overstaying in the future, the Director (USCIS) must immediately look into adjustments of status and proceed accordingly from there with our Attorney General. Not doing so could potentially render the changes to how unlawful presence is calculated pointless.</p> <p>In addition to what I have already expressed, any attempts to deter future illegals (like visa overstays) must take into account the 3/10 year statutory bars. Our Director and Attorney General must realize that 3/10 year bars simply will not suffice.</p> <p>To truly send a message that overstaying visas will not be tolerated, we must:</p> <ol style="list-style-type: none"> 1) lengthen those bans (double, triple, etc.) 2) essentially eliminate any waivers of those 3/10 year bars 	
Srinivas [REDACTED]@[REDACTED]	<p>I would like to submit the following comments in response to the USCIS Proposed Policy Memo “Accrual of Unlawful Presence and F, J, and M Nonimmigrants” (PM-602-1060), posted on May 11, 2018.</p> <p>I am an F-1 international student who has recently graduated from university of south alabama and am working based on Optional Practical Training (OPT). My employer has recently petitioned for my H-1B work visa during the cap-subject application period in April.</p> <p>My concern with the proposed memorandum is that its new calculation of accrual of unlawful presence may jeopardize my ability to obtain a nonimmigrant visa from a consulate. By essentially equating unlawful presence with failure to maintain proper status, the policy memo puts an undue burden on F-1 students and penalizes them retroactively. The new calculation would render F-1 students unlawfully present dating back to the day after a failure to maintain F-1 status began, rather than from the day of an adverse decision by DHS or an immigration judge.</p>	

STAKEHOLDER/ ORGANIZATION	STAKEHOLDER COMMENTS	ORIGINATING OFFICE'S RESOLUTIONS
	<p>This is an undue burden and disproportionate penalty on us F-1 students because the policies for maintaining proper F-1 status have not always been made uniformly clear to us, or even to our DSOs. As an F-1 student, I rely heavily on my school's DSO in order to maintain valid status, as he or she issues my I-20s, endorses the I-20s for work authorization, and updates my records in the SEVIS system. F-1 students may have engaged in certain employment activities with the full endorsement of their school's DSO, and issuance of an Employment Authorization Document by DHS, only to discover later that the initial grant of work authorization was improper.</p> <p>These inconsistencies are sometimes due to DSO error but are also due to DHS interpretations that may change without warning and get applied retroactively, to our detriment. Updates to USCIS interpretation of employer-employee relationships, for example, may retroactively invalidate an arrangement that I worked under during my OPT training period. The proposed policy memo would result in accrual of unlawful presence retroactively, during a period of time when USCIS policy was different or unclear.</p> <p>Furthermore, the extensive processing times for H-1B change of status petitions, combined with the suspension of premium processing for cap-subject H-1B applications, puts students like me at risk of having accrued unlawful presence for more than six months by the time USCIS has adjudicated my H-1B application and made a determination on whether I have maintained proper status. The extensive service center backlogs, suspension of premium processing, and sudden change in unlawful presence interpretation are all beyond the control of F-1 students. Under this memo, I may be determined to have unknowingly accrued several months of unlawful presence, and a possible 3- or 10-year bar against re-entry, without having possessed the intent to do so, and without any means to remedy my situation once I become aware of it.</p> <p>The accrual of unlawful presence calculation is currently linked to an adverse determination by DHS or an immigration judge (or by the expiration of an I-94) because such a determination actively puts the student on notice that he or she was no longer authorized to stay and/or work in the U.S., and should depart immediately. The calculation under this proposed memo will put students like me in a position to have possibly accrued several months of unlawful presence unknowingly. It is further exacerbated by the fact that their accrual of unlawful presence may have been endorsed by my school's DSO, the main immigration-related official that I have any contact with and on whom I rely. The application of the proposed memo will unfairly penalize students like me who have acted in good faith, who timely applied for work authorization, and acted according to the policies in effect at the time. It will affect our ability to apply for any other nonimmigrant visa in the U.S., as well as prevent us from applying for a visa at a consulate abroad due to the inadmissibility bar.</p> <p>It is not my intention to overstay my visa or to be unlawfully present in the U.S. I have come to study in the U.S. in order to gain a higher education in America's universities, and to supplement my education</p>	

Accrual of Unlawful Presence and F, J, and M Nonimmigrants

Stakeholder Comments Matrix

STAKEHOLDER/ ORGANIZATION	STAKEHOLDER COMMENTS	ORIGINATING OFFICE'S RESOLUTIONS
	<p>through hands-on work experience. My intention is to do so by complying with the relevant immigration regulations and policies. However, when those policies are not always clear, and my studies or work experience are being endorsed by the school's DSO, I feel I should not be penalized retroactively when I have acted in good faith and am informed later that there was a problem with my maintenance of status. I would advocate for the continuation of the current calculation of accrual of unlawful presence for F-1 individuals, which would allow for clear notice to the F-1 student concerning a failure to maintain proper status, a clear start date for the accrual of unlawful presence, and application of a re-entry bar only after remaining in the U.S. for a significant period beyond that notice. This calculation is equitable and avoids disproportionately penalizing students who have acted in good faith, and would allow us an opportunity to remedy our visa status once we become aware of the problem by being able to depart the U.S. as soon as we become aware that unlawful presence has begun to accrue.</p> <p>I urge against the implementation of this proposed policy memo. Thank you for your consideration, time, and support in this matter</p>	
<p>Vamsi Krishna [REDACTED]@[REDACTED]</p>	<p>I would like to submit the following comments in response to the USCIS Proposed Policy Memo "Accrual of Unlawful Presence and F, J, and M Nonimmigrants" (PM-602-1060), posted on May 11, 2018.</p> <p>I am an F-1 international student who will be graduating in six months and am on internship based on Curriculum Practical Training (CPT). My employer has recently petitioned for my H-1B work visa during the cap-subject application period in April.</p> <p>My concern with the proposed memorandum is that its new calculation of accrual of unlawful presence may jeopardize my ability to obtain a nonimmigrant visa from a consulate. By essentially equating unlawful presence with failure to maintain proper status, the policy memo puts an undue burden on F-1 students and penalizes them retroactively. The new calculation would render F-1 students unlawfully present dating back to the day after a failure to maintain F-1 status began, rather than from the day of an adverse decision by DHS or an immigration judge.</p> <p>This is an undue burden and disproportionate penalty on us F-1 students because the policies for maintaining proper F-1 status have not always been made uniformly clear to us, or even to our DSOs. As an F-1 student, I rely heavily on my school's DSO in order to maintain valid status, as he or she issues my I-20s, endorses the I-20s for work authorization, and updates my records in the SEVIS system. F-1 students may have engaged in certain employment activities with the full endorsement of their school's DSO, and issuance of an Employment Authorization Document by DHS, only to discover later that the initial grant of work authorization was improper.</p> <p>These inconsistencies are sometimes due to DSO error but are also due to DHS interpretations that may change without warning and get applied retroactively, to our detriment. Updates to USCIS</p>	

STAKEHOLDER/ ORGANIZATION	STAKEHOLDER COMMENTS	ORIGINATING OFFICE'S RESOLUTIONS
	<p>interpretation of employer-employee relationships, for example, may retroactively invalidate an arrangement that I worked under during my OPT training period. The proposed policy memo would result in accrual of unlawful presence retroactively, during a period of time when USCIS policy was different or unclear.</p> <p>Furthermore, the extensive processing times for H-1B change of status petitions, combined with the suspension of premium processing for cap-subject H-1B applications, puts students like me at risk of having accrued unlawful presence for more than six months by the time USCIS has adjudicated my H-1B application and made a determination on whether I have maintained proper status. The extensive service center backlogs, suspension of premium processing, and sudden change in unlawful presence interpretation are all beyond the control of F-1 students. Under this memo, I may be determined to have unknowingly accrued several months of unlawful presence, and a possible 3- or 10-year bar against re-entry, without having possessed the intent to do so, and without any means to remedy my situation once I become aware of it.</p> <p>The accrual of unlawful presence calculation is currently linked to an adverse determination by DHS or an immigration judge (or by the expiration of an I-94) because such a determination actively puts the student on notice that he or she was no longer authorized to stay and/or work in the U.S., and should depart immediately. The calculation under this proposed memo will put students like me in a position to have possibly accrued several months of unlawful presence unknowingly. It is further exacerbated by the fact that their accrual of unlawful presence may have been endorsed by my school's DSO, the main immigration-related official that I have any contact with and on whom I rely. The application of the proposed memo will unfairly penalize students like me who have acted in good faith, who timely applied for work authorization, and acted according to the policies in effect at the time. It will affect our ability to apply for any other nonimmigrant visa in the U.S., as well as prevent us from applying for a visa at a consulate abroad due to the inadmissibility bar.</p> <p>It is not my intention to overstay my visa or to be unlawfully present in the U.S. I have come to study in the U.S. in order to gain a higher education in America's universities and to supplement my education through hands-on work experience. My intention is to do so by complying with the relevant immigration regulations and policies. However, when those policies are not always clear, and my studies or work experience are being endorsed by the school's DSO, I feel I should not be penalized retroactively when I have acted in good faith and am informed later that there was a problem with my maintenance of status. I would advocate for the continuation of the current calculation of accrual of unlawful presence for F-1 individuals, which would allow for clear notice to the F-1 student concerning a failure to maintain proper status, a clear start date for the accrual of unlawful presence, and application of a re-entry bar only after remaining in the U.S. for a significant period beyond that notice. This calculation is equitable and avoids disproportionately penalizing students who have acted in good</p>	

STAKEHOLDER/ ORGANIZATION	STAKEHOLDER COMMENTS	ORIGINATING OFFICE'S RESOLUTIONS
	<p>faith, and would allow us an opportunity to remedy our visa status once we become aware of the problem by being able to depart the U.S. as soon as we become aware that unlawful presence has begun to accrue.</p> <p>I urge against the implementation of this proposed policy memo. Thank you for your consideration, time, and support in this matter.</p>	
<p>Mahesh B. Computer System Analyst BTree Solutions [REDACTED]@[REDACTED]</p>	<p>I would like to submit the following comments in response to the USCIS Proposed Policy Memo "Accrual of Unlawful Presence and F, J, and M Nonimmigrants" (PM-602-1060), posted on May 11, 2018.</p> <p>I am the Computer System Analyst of a company whose employees include recently-graduated international students who are in the U.S. on an F-1 visa and are working based on their Optional Practical Training (OPT). Our company has employed these graduates during their OPT period, provided them with training, and recently applied for these employees' H-1B work visa during the cap-subject application period in April.</p> <p>Our concern with the proposed memorandum is that our F-1 employees' ability to obtain a nonimmigrant visa from a consulate may be jeopardized by the new calculation of accrual of unlawful presence. By essentially equating unlawful presence with failure to maintain proper status, the policy memo puts an undue burden on F-1 students and penalizes them retroactively. The new calculation would render F-1 students unlawfully present dating back to the day after their failure to maintain F-1 status began, rather than from the day of an adverse decision by DHS or an immigration judge.</p> <p>This is an undue burden and disproportionate penalty on the F-1 students, and on our company as their employer, because the policies for maintaining proper F-1 status have not always been made uniformly clear to the students, their employers, and even to the DSOs. F-1 students rely heavily on their school's DSO in order to maintain valid status, as the DSO issues them I-20s, endorses them for work authorization, and updates their records in the SEVIS system. F-1 students may have engaged in certain employment activities with the full endorsement of their school's DSO, and issuance of an Employment Authorization Document by DHS, only to discover later that the initial grant of work authorization was improper.</p> <p>These inconsistencies are sometimes due to DSO error but are also due to DHS interpretations that may change without warning and get applied retroactively, to the students' and their employers' detriment. Updates to USCIS interpretation of employer-employee relationships, for example, may retroactively</p>	

STAKEHOLDER/ ORGANIZATION	STAKEHOLDER COMMENTS	ORIGINATING OFFICE'S RESOLUTIONS
	<p>invalidate a work arrangement in place during a student's OPT period. The proposed policy memo would result in the student accruing unlawful presence retroactively, during a period of time when USCIS policy was different or unclear.</p> <p>Furthermore, the extensive processing times for an H-1B change of status petitions, combined with the suspension of premium processing for cap-subject H-1B applications, puts these students at risk of having accrued unlawful presence for more than six months by the time USCIS has adjudicated the application and made a determination on the status issue. The extensive service center backlogs, suspension of premium processing, and sudden change in unlawful presence interpretation are all beyond the control of the F-1 students and their employers. Under this memo, students may be determined to have unknowingly accrued several months of unlawful presence, and a possible 3- or 10-year bar against re-entry, without having possessed the intent to do so, and without any means to remedy their situation once they become aware of it.</p> <p>The accrual of unlawful presence calculation is currently linked to an adverse determination by DHS or an immigration judge (or by the expiration of an I-94) because such a determination actively puts the student on notice that he or she was no longer authorized to stay and/or work in the U.S., and should depart immediately. The calculation under this proposed memo will put students in a position to have possibly accrued several months of unlawful presence unknowingly. It is further exacerbated by the fact that their accrual of unlawful presence may have been endorsed by their school's DSO, the main immigration-related official that most of the students have any contact with and on whom they rely. The application of the proposed memo will unfairly penalize students who have acted in good faith, who timely applied for work authorization that was made available to them, and acted according to the policies in effect at the time. It will affect their ability to apply for any other nonimmigrant visa in the U.S., as well as prevent them from applying for a visa at a consulate abroad due to the inadmissibility bar.</p> <p>As an employer of these recent graduates, the implementation of this memo will also adversely affect our business, as we have invested in training them during their OPT period and have sponsored them for their H-1B visa. Our company likewise acted in good faith in employing them pursuant to their Employment Authorization Documents, in training them, and in seeking to employ them further so that they can contribute to our business. Our investment in these students may be lost with the implementation of this memo if they can be found retroactively unlawfully present, with a possible years-long bar against re-entry.</p>	

Accrual of Unlawful Presence and F, J, and M Nonimmigrants

Stakeholder Comments Matrix

STAKEHOLDER/ ORGANIZATION	STAKEHOLDER COMMENTS	ORIGINATING OFFICE'S RESOLUTIONS
	<p>We would advocate for the continuation of the current calculation of accrual of unlawful presence for F-1 individuals, which would allow for clear notice to the F-1 student concerning a failure to maintain proper status, a clear start date for the accrual of unlawful presence, and only penalizes them with a re-entry bar if they knowingly remain in the U.S. for a significant period beyond that notice. This calculation is equitable and avoids disproportionately penalizing students and their employers who have acted in good faith, and allows the students an opportunity to remedy their visa status once they become aware of the problem.</p> <p>We urge against the implementation of this proposed policy memo. Thank you for your consideration, time, and support in this matter.</p>	
<p>Vamsee Krishna [REDACTED]@[REDACTED]</p>	<p>Now a days we are hearing all types of new rules regarding the immigration changes and firstly I would like to appreciate that, and according to the new memorandum it is very clear that all f1 students or any other person is being framed even though they have been following the rules according to the rule book please make some changes such as restricting work in the third party locations as most of the consulting firms are the ones which are the main reason for abusing the the immigration laws and some of the students who came to do their masters did their masters but unfortunately the universities they completed the masters lost their accreditation and those kind of guys are trying to get another masters which is valid so please make some changes so that students dont get effected because of the things which are caused by the consulting firms</p>	
<p>Uday Maripalli [REDACTED]@[REDACTED]</p>	<p>I would like to submit the following comments in response to the USCIS Proposed Policy Memo "Accrual of Unlawful Presence and F, J, and M Nonimmigrants" (PM-602-1060), posted on May 11, 2018.</p> <p>My concern with the proposed memorandum is that its new calculation of accrual of unlawful presence may jeopardize my ability to obtain a nonimmigrant visa from a consulate. By essentially equating unlawful presence with failure to maintain proper status, the policy memo puts an undue burden on F-1 students and penalizes them retroactively. The new calculation would render F-1 students unlawfully present dating back to the day after a failure to maintain F-1 status began, rather than from the day of an adverse decision by DHS or an immigration judge.</p> <p>This is an undue burden and disproportionate penalty on us F-1 students because the policies for maintaining proper F-1 status have not always been made uniformly clear to us, or even to our DSOs. F-1 students rely heavily on school's DSO in order to maintain valid status, as he or she issues I-20s, endorses the I-20s for work authorization, and updates records in the SEVIS system. F-1 students may</p>	

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	<p>have engaged in certain employment activities with the full endorsement of their school's DSO, and issuance of an Employment Authorization Document by DHS, only to discover later that the initial grant of work authorization was improper.</p> <p>These inconsistencies are sometimes due to DSO error but are also due to DHS interpretations that may change without warning and get applied retroactively, to our detriment. The proposed policy memo would result in accrual of unlawful presence retroactively, during a period of time when USCIS policy was different or unclear.</p> <p>Furthermore, the extensive processing times for H-1B change of status petitions, combined with the suspension of premium processing for cap-subject H-1B applications, puts students at risk of having accrued unlawful presence for more than six months by the time USCIS has adjudicated H-1B application and made a determination on whether the applicant have maintained proper status. The extensive service center backlogs, suspension of premium processing, and sudden change in unlawful presence interpretation are all beyond the control of F-1 students. Under this memo, many students may be determined to have unknowingly accrued several months of unlawful presence, and a possible 3- or 10-year bar against re-entry, without having possessed the intent to do so, and without any means to remedy my situation once they become aware of it.</p> <p>The accrual of unlawful presence calculation is currently linked to an adverse determination by DHS or an immigration judge (or by the expiration of an I-94) because such a determination actively puts the student on notice that he or she was no longer authorized to stay and/or work in the U.S., and should depart immediately. The calculation under this proposed memo will put many students in a position to have possibly accrued several months of unlawful presence unknowingly. It is further exacerbated by the fact that their accrual of unlawful presence may have been endorsed by my school's DSO, the main immigration-related official that they have any contact with and on whom they rely on. The application of the proposed memo will unfairly penalize students who have acted in good faith, who timely applied for work authorization, and acted according to the policies in effect at the time. It will affect their ability to apply for any other nonimmigrant visa in the U.S., as well as prevent them from applying for a visa at a consulate abroad due to the inadmissibility bar.</p> <p>When those policies are not always clear, and studies or work experience are being endorsed by the school's DSO, I feel that the students should not be penalized retroactively when they have acted in good faith and am informed later that there was a problem with maintenance of status. I would advocate for the continuation of the current calculation of accrual of unlawful presence for F-1 individuals,</p>	

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	<p>which would allow for clear notice to the F-1 student concerning a failure to maintain proper status, a clear start date for the accrual of unlawful presence, and application of a re-entry bar only after remaining in the U.S. for a significant period beyond that notice. This calculation is equitable and avoids disproportionately penalizing students who have acted in good faith, and would allow us an opportunity to remedy the visa status once they become aware of the problem by being able to depart the U.S. as soon as they become aware that unlawful presence has begun to accrue.</p> <p>I urge against the implementation of this proposed policy memo. Thank you for your consideration, time, and support in this matter.</p>	
Mellacheruvu Naga Santosh Aditya [REDACTED]@[REDACTED]	<p>Hello i have read the new memo policy posted in the uscis website . Here are my comments on that,</p> <p>I will specify the f1 category policies:</p> <ul style="list-style-type: none"> - f1 students should be allowed to work with cpt programme after their completion of opt programme by registering into universities. since they are utilizing their merit with the subject relevant to their work legally and paying taxes and fees . - Cpt will enhance the opportunities for non immigrant students to improve their skills and provide an effective work force with good technical skill set to the United States. - non immigrants who have not been selected in the lottery and working legally will have further chances to work by the cpt and at the same time pay the university fees and improve their technical knowledge. 	
Rebecca Carcagno The Law Offices of Rebecca Carcagno, PLLC [REDACTED] Ann Arbor, MI [REDACTED]@[REDACTED]	<p>My comment is regarding the following <u>section</u> of the proposed policy memoranda: <i>F, J, or M nonimmigrants who failed to maintain nonimmigrant status before August 9, 2018. (pages 3-4)</i></p> <p>This section should be removed completely because those affected visa holders would not be provided sufficient notice to avoid severe consequences; these visa holders should not be penalized as unlawfully present for the time before the policy memoranda would actually go into effect due to insufficient notice. Such a change could not be anticipated to happen because even for the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, time before this Act went into effect was not counted for purposes of determining unlawful presence for the 3/10 year bars. To summarize, these visa holders need notice and would not be given sufficient notice so that this section should be removed completely.</p>	

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<p>Megan McLaughlin International Coordinator Waldorf University</p> <p>[REDACTED]@[REDACTED] [REDACTED] Forest City, Iowa [REDACTED]</p>	<p>Thank you for your consideration of my comment.</p> <p>I had a chance to read the draft policy memorandum for accrual of unlawful presence for F, J, and M nonimmigrants. I am concerned about the following:</p> <p>Foreign students (F nonimmigrant) generally do not accrue unlawful presence in certain situations, including but are not limited to:</p> <p>The period of time an F-1 nonimmigrant was out of status if he or she applies for reinstatement under 8 CFR 214.2(f)(16), provided that the application is ultimately approved;²⁹</p> <p>The reason why I am concerned is that if a student applies for reinstatement and is denied, then the date of when they lost their status/ or failed to pursue a full course of study would begin the count/accrual of unlawful presence. I would suggest that the accrual date for unlawful presence should begin on the date they receive their denial letter. Students currently have a presumptive 5 month period to apply for reinstatement, and if the USCIS takes 6-12 months to process reinstatements (as has been the current trend) then the student would easily find themselves accruing more than 6-12 months of unlawful presence subjecting them to the 3 year or 10 year bar. Furthermore, it has been our understanding that, generally speaking, students who have an application pending with the USCIS are considered to be legally present while that application is pending. Would the time their application is pending not be counted toward unlawful presence? If not, those students who are denied reinstatement may immediately be subject to the 10 year bar on repeat participation.</p> <p>Please explain and clarify.</p>	
<p>Sandy Kuntz International Program Assistant American Collegiate English (ACE) Grossmont College</p> <p>[REDACTED] El Cajon, CA [REDACTED]</p>	<p>My concerns are the following:</p> <p>1) Implementation of policies that further restrict international students do not benefit the U.S. International students are choosing to study in Canada, Australia, New Zealand instead of the U.S., costing the U.S. millions of dollars in lost revenue, forcing small schools to close and jobs like mine to be lost, and, most importantly, losing the peaceful diplomacy that international exchange provides to US citizens and worldwide.</p>	

Accrual of Unlawful Presence and F, J, and M Nonimmigrants

Stakeholder Comments Matrix

STAKEHOLDER/ ORGANIZATION	STAKEHOLDER COMMENTS	ORIGINATING OFFICE'S RESOLUTIONS
[REDACTED]@ [REDACTED] phone [REDACTED] fax [REDACTED]	<p>2) Individual international students may end up being wrongly identified as failing to maintain their status by USCIS when they in fact are in the U.S. for the grace period after a program ends, preparing to transfer to a college or university.</p> <p>I urge against the implementation of this proposed policy memo. Thank you for your consideration.</p>	
Vishwa Swaroop Padarti [REDACTED]@ [REDACTED]	<p>According to this policy, the students are not eligible to do second masters. This will not only affect our career but also our passion to excel in other domains.</p> <p>I did my masters in computer sciences and but I do have interest getting the other masters degree (ex: Data science). If this rule got into action everyone will be locked in there on domain 's and we will not evolve.</p> <p>It would good if you could revise this rule once again.</p>	
Venkata Bandrupalli [REDACTED]@ [REDACTED]	<p>I would like to submit the following comments in response to the USCIS Proposed Policy Memo "Accrual of Unlawful Presence and F, J, and M Nonimmigrants" (PM-602-1060), posted on May 11, 2018.</p> <p>I am an F-1 international student who has recently graduated from Oklahoma State University and am working based on Optional Practical Training (OPT). My employer has recently petitioned for my H-1B work visa during the cap-subject application period in April.</p> <p>My concern with the proposed memorandum is that its new calculation of accrual of unlawful presence may jeopardize my ability to obtain a nonimmigrant visa from a consulate. By essentially equating unlawful presence with failure to maintain proper status, the policy memo puts an undue burden on F-1 students and penalizes them retroactively. The new calculation would render F-1 students unlawfully present dating back to the day after a failure to maintain F-1 status began, rather than from the day of an adverse decision by DHS or an immigration judge.</p> <p>This is an undue burden and disproportionate penalty on us F-1 students because the policies for maintaining proper F-1 status have not always been made uniformly clear to us, or even to our DSOs. As an F-1 student, I rely heavily on my school's DSO in order to maintain valid status, as he or she issues my I-20s, endorses the I-20s for work authorization, and updates my records in the SEVIS system. F-1 students may have engaged in certain employment activities with the full endorsement of their school's DSO, and issuance of an Employment Authorization Document by DHS, only to discover later that the initial grant of work authorization was improper.</p> <p>These inconsistencies are sometimes due to DSO error but are also due to DHS interpretations that may</p>	

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	<p>change without warning and get applied retroactively, to our detriment. Updates to USCIS interpretation of employer-employee relationships, for example, may retroactively invalidate an arrangement that I worked under during my OPT training period. The proposed policy memo would result in accrual of unlawful presence retroactively, during a period of time when USCIS policy was different or unclear.</p> <p>Furthermore, the extensive processing times for H-1B change of status petitions, combined with the suspension of premium processing for cap-subject H-1B applications, puts students like me at risk of having accrued unlawful presence for more than six months by the time USCIS has adjudicated my H-1B application and made a determination on whether I have maintained proper status. The extensive service center backlogs, suspension of premium processing, and sudden change in unlawful presence interpretation are all beyond the control of F-1 students. Under this memo, I may be determined to have unknowingly accrued several months of unlawful presence, and a possible 3- or 10-year bar against re-entry, without having possessed the intent to do so, and without any means to remedy my situation once I become aware of it.</p> <p>The accrual of unlawful presence calculation is currently linked to an adverse determination by DHS or an immigration judge (or by the expiration of an I-94) because such a determination actively puts the student on notice that he or she was no longer authorized to stay and/or work in the U.S., and should depart immediately. The calculation under this proposed memo will put students like me in a position to have possibly accrued several months of unlawful presence unknowingly. It is further exacerbated by the fact that their accrual of unlawful presence may have been endorsed by my school's DSO, the main immigration-related official that I have any contact with and on whom I rely. The application of the proposed memo will unfairly penalize students like me who have acted in good faith, who timely applied for work authorization, and acted according to the policies in effect at the time. It will affect our ability to apply for any other nonimmigrant visa in the U.S., as well as prevent us from applying for a visa at a consulate abroad due to the inadmissibility bar.</p> <p>It is not my intention to overstay my visa or to be unlawfully present in the U.S. I have come to study in the U.S. in order to gain a higher education in America's universities, and to supplement my education through hands-on work experience. My intention is to do so by complying with the relevant immigration regulations and policies. However, when those policies are not always clear, and my studies or work experience are being endorsed by the school's DSO, I feel I should not be penalized retroactively when I have acted in good faith and am informed later that there was a problem with my maintenance of status. I would advocate for the continuation of the current calculation of accrual of unlawful presence for F-1 individuals, which would allow for clear notice to the F-1 student concerning a failure to maintain proper status, a clear start date for the accrual of unlawful presence, and application of a re-entry bar only after remaining in the U.S. for a significant period beyond that notice.</p>	

STAKEHOLDER/ ORGANIZATION	STAKEHOLDER COMMENTS	ORIGINATING OFFICE'S RESOLUTIONS
	<p>This calculation is equitable and avoids disproportionately penalizing students who have acted in good faith, and would allow us an opportunity to remedy our visa status once we become aware of the problem by being able to depart the U.S. as soon as we become aware that unlawful presence has begun to accrue.</p> <p>I urge against the implementation of this proposed policy memo. Thank you for your consideration, time, and support in this matter.</p>	
<p>Ada Zhang [REDACTED]@[REDACTED]</p>	<p>On page 3 of Accrual of Unlawful Presence and F, J, and M Nonimmigrants (PDF, 179 KB): F, J, or M nonimmigrants who failed to maintain their nonimmigrant status before August 9, 2018 start accruing unlawful presence based on that failure on August 9, 2018.</p> <p>Integrated with a new interpretation of the regulations by USCIS suggests that CPT cannot authorized AT ALL if the student is at the same degree level. (This is based on an existing regulation which states: "A student may be authorized 12 months of practical training, and becomes eligible for another 12 months of practical training when he or she changes to a higher educational level." 8 CFR 214.2(f)(10).)</p> <p>What I understand from the content above is, students living and working in US with CPT work permit post first master's degree are subjected as unlawful immigrants from August 9, 2018</p> <p>If that is correct, I don't see why students who use CPT accrue unlawful presence. The rapid development of society and knowledge requires people to go back to school often, especially people who work in technology or information market. Most of the time, human nature makes us arouse interest in different fields. These are the main reasons why people go back to school and pursue a second master's degree. CPT is necessary and crucial when students want to get a better understanding of what they have learned in school and gain practical experience directly related to their major through employment.</p> <p>Recommended change: on page 3, the alien failed to maintain status should not include the scenario when F1 students with CPT post first master's degree.</p>	
<p>Chenna Reddy [REDACTED]@[REDACTED]</p>	<p>Help in decision on Day-1 CPT</p>	
<p>Shan Cao [REDACTED]@[REDACTED]</p>	<p>On page 3 of Accrual of Unlawful Presence and F, J, and M Nonimmigrants (PDF, 179 KB): F, J, or M nonimmigrants who failed to maintain their nonimmigrant status before August 9, 2018 start accruing unlawful presence based on that failure on August 9, 2018.</p>	

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	<p>Integrated with a new interpretation of the regulations by USCIS suggests that CPT cannot authorized AT ALL if the student is at the same degree level. (This is based on an existing regulation which states: "A student may be authorized 12 months of practical training, and becomes eligible for another 12 months of practical training when he or she changes to a higher educational level." 8 CFR 214.2(f)(10).)</p> <p>What I understand from the content above is, students living and working in US with CPT work permit post first master's degree are subjected as unlawful immigrants from August 9, 2018</p> <p>If that is correct, I don't see why students who use CPT accrue unlawful presence. The rapid development of society and knowledge requires people to go back to school often, especially people who work in technology or information market. Most of the time, human nature makes us arouse interest in different fields. These are the main reasons why people go back to school and pursue a second master's degree. CPT is necessary and crucial when students want to get a better understanding of what they have learned in school and gain practical experience directly related to their major through employment.</p> <p>Recommended change: on page 3, the alien failed to maintain status should not include the scenario when F1 students with CPT post first master's degree.</p>	
Jing Qu [REDACTED]@[REDACTED]	<p>On page 3 of Accrual of Unlawful Presence and F, J, and M Nonimmigrants (PDF, 179 KB): F, J, or M nonimmigrants who failed to maintain their nonimmigrant status before August 9, 2018 start accruing unlawful presence based on that failure on August 9, 2018.</p> <p>Please clarify that working in US with CPT post first master's degree is NOT one of the scenarios of "failed to maintain their nonimmigrant status". Because If I get my master degree in Financing and decide to pursue a MBA, I will not have the chance to gain practical experience via CPT.</p>	
Vaibhav Kumar [REDACTED]@[REDACTED]	This Policy Memorandum will affect many citizens, please don't pass this!	
Rebecca Johnson [REDACTED]@[REDACTED]	<p>I am writing to express my concerns about Policy Memorandum # PM-602-1060.</p> <p>The new definition will have significant impacts on international students as well as on the institutions of higher education that enroll them.</p> <p>For F-1 and J-1 students, the new definition makes the U.S. even more unwelcoming for</p>	

STAKEHOLDER/ ORGANIZATION	STAKEHOLDER COMMENTS	ORIGINATING OFFICE'S RESOLUTIONS
	<p>international students and could affect recruitment and enrollment numbers.</p> <ul style="list-style-type: none"> Universities could lose currently enrolled students who inadvertently fall out of status. Under the new definition, students will lose the due process right of appeal, the ability to file for reinstatement, or take other recourse as they become immediately deportable instead of having the right to a decision by a judge. As a result, the US Government would be indicating that students (and other non-immigrants) lawfully present in the US on valid visas have no rights and no redress should their SEVIS record be terminated by a mistake or by administrative error. Students who withdraw from credits mid-semester and fall below full-time enrollment, must have their SEVIS records terminated at the time of withdrawal. The new definition would impede students' ability to file for reinstatement and rectify their situation. The new policy proposes a permanent bar to re-entry to the U.S. for students who overstay their departure date and would impose a particularly harsh penalty for a student who dropped a course to ensure their GPA was not impacted by a poor grade. The current regulations around visa overstay are currently adequate to remove unwanted individuals and to bar those with criminal offenses. Visas can be revoked now for many offenses including driving under the influence and the SEVIS system immediately identifies violations of status to enable tracking of problem students. It is imperative that university personnel be given a window to work with students and help them get back on track in order to retain them and maximize their success. If there is concern about the inadequacy of the current regulations, it would be more effective to increase communication between local DHS agents and Universities to allow DSOs to help students file for reinstatement instead of having them fall out of status. It is concerning that DACA students who did not make the decision to come to the US could be immediately deported and barred from return. The policy proposal does not distinguish between an otherwise law-abiding non-immigrant here on a valid visa and an individual with a negative background or intent. <p>I urge you to reconsider and withdraw this change in policy.</p>	
Rajasekhar Sanikommu [REDACTED]@[REDACTED]	IT is not at all lawful because doing masters or another courses anything depends on his carrier if the laws was not correct in my opinion i am totally opposes the policy	
Bharath Reddy [REDACTED]@[REDACTED]	<p>Please don't remove CPT for second Master degree. H1-B lottery system makes it difficult for OPT student to get H1-B first time due the large volume of applicants.</p> <p>Also, if USCIS implement this rule bright students will not be attracted by the American Universities. it impacts economy too.</p> <p>Until USCIS resolve lottery system issue or bring up points system, keep it as is. Don't change.</p>	

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	America is a land of opportunities. Make America great again!!	
John Rohe [REDACTED]@[REDACTED]	<p>This support for the Policy Memo is being submitted within your 30-day comment period.</p> <p>On May 11, 2018 the Wall Street Journal addressed this Policy Memo in an article entitled "Trump Administration Seeks to Tighten Student, Exchange Visa Oversight." This article describes the change as follows:</p> <p>"Under the old rules, which date back to 1997, the government begins counting the days someone is in the country without authorization when the violation is discovered. Under the new rules, which are to take effect in 90 days, the clock would be set back to when the visitor first fell out of compliance."</p> <p>The proposed policy change makes sense. Anyone entering the country on a visa has sufficient information to understand the terms of their visit. The clock on noncompliance should be set back to the date when the visitor first fell out of compliance.</p>	
Alias Vegas [REDACTED]@[REDACTED]	<p>I would like to submit the following comments in response to the USCIS Proposed Policy Memo "Accrual of Unlawful Presence and F, J, and M Nonimmigrants" (PM-602-1060), posted on May 11, 2018.</p> <p>I am an F-1 international student who has recently graduated from [university] and am working based on Optional Practical Training (OPT). My employer has recently petitioned for my H-1B work visa during the cap-subject application period in April.</p> <p>My concern with the proposed memorandum is that its new calculation of accrual of unlawful presence may jeopardize my ability to obtain a nonimmigrant visa from a consulate. By essentially equating unlawful presence with failure to maintain proper status, the policy memo puts an undue burden on F-1 students and penalizes them retroactively. The new calculation would render F-1 students unlawfully present dating back to the day after a failure to maintain F-1 status began, rather than from the day of an adverse decision by DHS or an immigration judge.</p> <p>This is an undue burden and disproportionate penalty on us F-1 students because the policies for maintaining proper F-1 status have not always been made uniformly clear to us, or even to our DSOs. As an F-1 student, I rely heavily on my school's DSO in order to maintain valid status, as he or she issues my I-20s, endorses the I-20s for work authorization, and updates my records in the SEVIS system. F-1 students may have engaged in certain employment activities with the full endorsement of their school's DSO, and issuance of an Employment Authorization Document by DHS, only to discover later that the initial grant of work authorization was improper.</p>	

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	<p>These inconsistencies are sometimes due to DSO error but are also due to DHS interpretations that may change without warning and get applied retroactively, to our detriment. Updates to USCIS interpretation of employer-employee relationships, for example, may retroactively invalidate an arrangement that I worked under during my OPT training period. The proposed policy memo would result in accrual of unlawful presence retroactively, during a period of time when USCIS policy was different or unclear.</p> <p>Furthermore, the extensive processing times for H-1B change of status petitions, combined with the suspension of premium processing for cap-subject H-1B applications, puts students like me at risk of having accrued unlawful presence for more than six months by the time USCIS has adjudicated my H-1B application and made a determination on whether I have maintained proper status. The extensive service center backlogs, suspension of premium processing, and sudden change in unlawful presence interpretation are all beyond the control of F-1 students. Under this memo, I may be determined to have unknowingly accrued several months of unlawful presence, and a possible 3- or 10-year bar against re-entry, without having possessed the intent to do so, and without any means to remedy my situation once I become aware of it.</p> <p>The accrual of unlawful presence calculation is currently linked to an adverse determination by DHS or an immigration judge (or by the expiration of an I-94) because such a determination actively puts the student on notice that he or she was no longer authorized to stay and/or work in the U.S., and should depart immediately. The calculation under this proposed memo will put students like me in a position to have possibly accrued several months of unlawful presence unknowingly. It is further exacerbated by the fact that their accrual of unlawful presence may have been endorsed by my school's DSO, the main immigration-related official that I have any contact with and on whom I rely. The application of the proposed memo will unfairly penalize students like me who have acted in good faith, who timely applied for work authorization, and acted according to the policies in effect at the time. It will affect our ability to apply for any other nonimmigrant visa in the U.S., as well as prevent us from applying for a visa at a consulate abroad due to the inadmissibility bar.</p> <p>It is not my intention to overstay my visa or to be unlawfully present in the U.S. I have come to study in the U.S. in order to gain a higher education in America's universities, and to supplement my education through hands-on work experience. My intention is to do so by complying with the relevant immigration regulations and policies. However, when those policies are not always clear, and my studies or work experience are being endorsed by the school's DSO, I feel I should not be penalized retroactively when I have acted in good faith and am informed later that there was a problem with my maintenance of status. I would advocate for the continuation of the current calculation of accrual of unlawful presence for F-1 individuals, which would allow for clear notice to the F-1 student concerning a failure to maintain proper status, a clear start date for the accrual of unlawful presence, and</p>	

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	<p>application of a re-entry bar only after remaining in the U.S. for a significant period beyond that notice. This calculation is equitable and avoids disproportionately penalizing students who have acted in good faith, and would allow us an opportunity to remedy our visa status once we become aware of the problem by being able to depart the U.S. as soon as we become aware that unlawful presence has begun to accrue.</p> <p>I urge against the implementation of this proposed policy memo. Thank you for your consideration, time, and support in this matter.</p>	
<p>Liz Kruse Assistant Director International Programs University of Wisconsin-Platteville</p> <p>[REDACTED] Platteville, WI [REDACTED]</p> <p>Phone: [REDACTED] Email: [REDACTED]@[REDACTED]</p>	<p>I am writing in response to the U.S. Citizenship and Immigration Services (USCIS) policy memorandum of May 10, 2018, "Accrual of Unlawful Presence and F, J, and M Nonimmigrants."</p> <p>My utmost concern with this policy change is that it would allow USCIS to apply unlawful presence to students or exchange visitors retroactively without students or exchange visitors having any advance notification that they were in violation of their status. Indeed, students, exchange visitors and/or DSOs/AROs may have believed in good faith that the student or exchange visitor was maintaining legal status, only to discover later that the student/exchange visitor unknowingly committed a status violation and may already be subject to a bar to re-entry.</p> <p>Not only is this policy change unfair and logistically very challenging to enforce, but it is contrary to our nation's best interests. When we create an unwelcome atmosphere for international students and exchange visitors, and put in place policies that deter them from choosing our country as a place engage in educational and cross-cultural exchange activities, then we make our nation less safe and we deprive ourselves of valuable allies.</p> <p>Furthermore, the policy change does not address how unlawful presence will be applied to reinstatement applicants, DACA recipients with orders of removal, or students with DSO-authorized CPT that is later determined to be inappropriately authorized.</p> <p>Since the proposed change outlined in this memorandum has the potential to wrongly identify a large number of foreign students and exchange visitors as failing to maintain lawful status and to unfairly subject them to the 3-year, 10-year, or permanent bars to re-entry, I am requesting that you please leave in place the current policy, which has been in place for over 20 years, and withdraw the memo and implement the changes outlined in the letter submitted to you by NAFSA: Association of International Educators on May 25, 2018:</p> <ul style="list-style-type: none"> · Do not implement any policy change until implementation has been fully coordinated with the Department of State and other DHS units such as CBP and SEVP. · Exclude from the unlawful presence count any status violations that occurred under color of law, to avoid "gotcha" scenarios, where the student reasonably relied on the authorizations granted. For example, curricular practical training authorized in SEVIS that DHS later determines may have been improperly given, should not start the unlawful presence "clock" until DHS or an immigration judge 	

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	<p>makes a formal status determination.</p> <ul style="list-style-type: none"> · Apply the change of status/extension of stay tolling rules to reinstatement applications. · Expand the sections describing examples where F, M, and J nonimmigrants "do not accrue unlawful presence in certain situations." [draft Adjudicator's Field Manual 40.9.2(b)(1)(E)(iii)]. 	
<p>Adam S. Greenberg Attorney at Law [REDACTED] Pittsburgh PA [REDACTED] [e] [REDACTED]@[REDACTED] [t] [REDACTED]</p>	<p>I write to comment on the proposed policy memorandum regarding "Accrual of Unlawful Present and F, J, and M Nonimmigrants". The proposed policy presents a series of potential implementation problems, and the underlying basis for the memo is legally questionable.</p> <p>To begin, INA section 212(a)(9)(B) is cited as authority for the proposed policy. Clause (ii) of that section defines unlawful presence for purposes of future admissibility, specifically stating that "an alien is deemed to be unlawfully present in the United States if the alien is present in the United States after the expiration of the period of stay authorized by the Attorney General or is present in the United States without being admitted or paroled." As F, J, and M nonimmigrants are all, by definition, admitted, the second part of this definition is inapplicable to them. USCIS' proposed policies do not square with the first part of this definition, however. A status violation is not an "expiration of [a] period". The period authorized at entry (or at an extension or change of status) is a known duration or else, if admitted for the duration of status as many students are, it is a known unknown. A period of authorized stay expires at the date given or else, as with students, it does not expire at all. In either case, action by the government to change the period of stay authorized requires an affirmative finding and action on its part within the existing policy. Were a different result desired where a status violation began the accrual of unlawful presence, Congress would have provided otherwise, such as by using "termination". USCIS will be afforded significantly less deference on this new and inconsistent interpretation of "expiration" within the statute. See <i>INS v. Cardoza-Fonseca</i>, 480 U.S. 421, 446n30 (1987).</p> <p>Even, however, if it is assumed that USCIS may define "expiration of a period of stay authorized" to include expiration through status violations alone, subjecting only nonimmigrant students and not all nonimmigrants to this new policy is arbitrary and capricious. USCIS may of course authorize different classes of nonimmigrant to engage in different activities; what it may not do is claim that identically violative actions will be treated differently under this statute. Under the proposed policy, a nonimmigrant student would start accumulating time unlawfully present upon undertaking a single day of unauthorized employment because USCIS indicates it will be interpreting the statute as such. However, it may not interpret the statute's definition of "expiration" that way for students, while permitting visitors or nonimmigrant workers to engage in unauthorized employment without considering their period of stay authorized to have expired. Unlawful presence accumulates as defined by INA section 212(a)(9)(B)(ii); USCIS interpretation might change the meaning of the terms therein.</p>	

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	<p>but cannot change the universality intended by Congress. Either interpretation by USCIS may be permissible, but declaring one permissible interpretation to be the agency's interpretation renders the other manifestly contrary to the statute. See <i>Chevron U.S.A., Inc. v. Nat'l Res. Def. Council, Inc.</i>, 467 U.S. 837, 843-44 (1984). The policy is, therefore, arbitrary, capricious, and ultra vires.</p> <p>Beyond the legal standing to put forth this policy, USCIS has failed to consider the impracticality of enforcing such an interpretation. The value in the previous interpretation was the certainty of the date on which time unlawfully present began to accumulate. It was either the date provided on form I-94 at entry (or on a subsequent extension or change of status) or the date on which a competent adjudicator found the status violation to exist. In either case, there is little argument over when time unlawfully present begins. Failure to maintain status by ceasing education may be seen as a fairly logical boundary between lawful and unlawful status, but the specific date may not be obvious or agreeable to all parties, such as with cessation during a school break. Likewise, cessation of studies is not the only status violation that will render a student unlawfully present. Unauthorized employment would be the obvious counter example. The school would not record a status violation at a fixed time, and, consequently, it could be unclear on what exact date unlawful presence began.</p> <p>These problems are compounded because the agency tasked with enforcing USCIS' interpretations of status violations for purposes of unlawful presence is not USCIS itself. Unlawful presence is only relevant following a departure. INA section 212(a)(9)(B)(i), see also INA section 212(a)(9)(C)(i). It will, therefore, be delegated to the US Department of State (or, in rare cases, to the US Customs and Border Protection Agency) to determine what constituted a status violation and when it occurred. Under current policy, these agencies are responsible for little more than comparing known dates on forms I-94 and agency orders and counting forward to the known date of departure. They do not have the expertise (because it has never before been required of them) to make determinations on status violations beyond simple expirations, particularly when these decisions could be as long as 10 years after departure and even longer after the violations themselves.</p> <p>Finally, it is noted that the proposed policy will eviscerate the regulations on reinstatement of student status. USCIS has thoughtfully included a provision where unlawful presence would be cancelled if a student successfully petitions for reinstatement to that status as permitted under 8 CFR sections 214.2(f)(16) and (m)(16). However, because the proposed policy cancels unlawful presence only if reinstatement is granted, and does not toll the accumulation of time unlawfully present even during the pendency of the request, and because USCIS reinstatement processing times are lengthy, students will be unable to accept the risk of a failed reinstatement that will be immediately met with a multi-year</p>	

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	<p>admissibility bar. The entire regulatory reinstatement process will be de facto forfeited to this policy.</p> <p>It is my recommendation, therefore, that USCIS abandon the proposed policy in its entirety. In the alternative, USCIS should consider restricting the status violations that instigate time unlawfully present to those violations where cessation of studies is recorded by the respective school and should consider tolling the accumulation of time unlawfully present while a nonfrivolous request for reinstatement is pending.</p>	
<p>Pradeep Reddy [REDACTED]@[REDACTED]</p>	<p>I would like to submit the following comments in response to the USCIS Proposed Policy Memo "Accrual of Unlawful Presence and F, J, and M Nonimmigrants" (PM-602-1060), posted on May 11, 2018.</p> <p>I am an F-1 international student who has recently graduated from [WSU] and am working based on Optional Practical Training (OPT). My employer has recently petitioned for my H-1B work visa during the cap-subject application period in April.</p> <p>My concern with the proposed memorandum is that its new calculation of accrual of unlawful presence may jeopardize my ability to obtain a nonimmigrant visa from a consulate. By essentially equating unlawful presence with failure to maintain proper status, the policy memo puts an undue burden on F-1 students and penalizes them retroactively. The new calculation would render F-1 students unlawfully present dating back to the day after a failure to maintain F-1 status began, rather than from the day of an adverse decision by DHS or an immigration judge.</p> <p>This is an undue burden and disproportionate penalty on us F-1 students because the policies for maintaining proper F-1 status have not always been made uniformly clear to us, or even to our DSOs. As an F-1 student, I rely heavily on my school's DSO in order to maintain valid status, as he or she issues my I-20s, endorses the I-20s for work authorization, and updates my records in the SEVIS system. F-1 students may have engaged in certain employment activities with the full endorsement of their school's DSO, and issuance of an Employment Authorization Document by DHS, only to discover later that the initial grant of work authorization was improper.</p> <p>These inconsistencies are sometimes due to DSO error but are also due to DHS interpretations that may change without warning and get applied retroactively, to our detriment. Updates to USCIS interpretation of employer-employee relationships, for example, may retroactively invalidate an arrangement that I worked under during my OPT training period. The proposed policy memo would</p>	

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	<p>result in accrual of unlawful presence retroactively, during a period of time when USCIS policy was different or unclear.</p> <p>Furthermore, the extensive processing times for H-1B change of status petitions, combined with the suspension of premium processing for cap-subject H-1B applications, puts students like me at risk of having accrued unlawful presence for more than six months by the time USCIS has adjudicated my H-1B application and made a determination on whether I have maintained proper status. The extensive service center backlogs, suspension of premium processing, and sudden change in unlawful presence interpretation are all beyond the control of F-1 students. Under this memo, I may be determined to have unknowingly accrued several months of unlawful presence, and a possible 3- or 10-year bar against re-entry, without having possessed the intent to do so, and without any means to remedy my situation once I become aware of it.</p> <p>The accrual of unlawful presence calculation is currently linked to an adverse determination by DHS or an immigration judge (or by the expiration of an I-94) because such a determination actively puts the student on notice that he or she was no longer authorized to stay and/or work in the U.S., and should depart immediately. The calculation under this proposed memo will put students like me in a position to have possibly accrued several months of unlawful presence unknowingly. It is further exacerbated by the fact that their accrual of unlawful presence may have been endorsed by my school's DSO, the main immigration-related official that I have any contact with and on whom I rely. The application of the proposed memo will unfairly penalize students like me who have acted in good faith, who timely applied for work authorization, and acted according to the policies in effect at the time. It will affect our ability to apply for any other nonimmigrant visa in the U.S., as well as prevent us from applying for a visa at a consulate abroad due to the inadmissibility bar.</p> <p>It is not my intention to overstay my visa or to be unlawfully present in the U.S. I have come to study in the U.S. in order to gain a higher education in America's universities, and to supplement my education through hands-on work experience. My intention is to do so by complying with the relevant immigration regulations and policies. However, when those policies are not always clear, and my studies or work experience are being endorsed by the school's DSO, I feel I should not be penalized retroactively when I have acted in good faith and am informed later that there was a problem with my maintenance of status. I would advocate for the continuation of the current calculation of accrual of unlawful presence for F-1 individuals, which would allow for clear notice to the F-1 student concerning a failure to maintain proper status, a clear start date for the accrual of unlawful presence, and application of a re-entry bar only after remaining in the U.S. for a significant period beyond that notice.</p>	

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	<p>This calculation is equitable and avoids disproportionately penalizing students who have acted in good faith, and would allow us an opportunity to remedy our visa status once we become aware of the problem by being able to depart the U.S. as soon as we become aware that unlawful presence has begun to accrue.</p> <p>I urge against the implementation of this proposed policy memo. Thank you for your consideration, time, and support in this matter.</p>	
<p>Julie Christensson Associate Director, International Student Services and SEVIS Coordinator Wichita State University Office of International Education Garvey [REDACTED] Wichita, KS [REDACTED] Office: [REDACTED] Fax: [REDACTED] E-mail: [REDACTED]@[REDACTED]</p>	<p>As a PDSO and RO for an institution that hosts approximately 1200 current F-1 and J-1 students and 500 former students on OPT, I was extremely disheartened and concerned to read the new policy memorandum regarding unlawful presence. While at first glance it may seem prudent to apply unlawful presence penalties to a group of nonimmigrants who have violated the terms of their status, as an experienced school official, I must point out the extreme injustice in it being applied as stated in the memorandum.</p> <p>I would first like to point out that the memo states that this new implementation of existing policy is being done in an effort to, "reduce the number of overstay" but offers no evidence of how the actions mentioned will accomplish this goal. Is there any evidence to show that current status holders subject to unlawful presence penalties are less likely to overstay? If anything, I would think that USCIS is risking the opposite – people not leaving the U.S. at any point because the penalty does not affect them so long as they are here in the U.S.</p> <p>The application of this rule in situations where a nonimmigrant student "is no longer in a period of stay authorized" is extremely concerning. The memo does not explain how or when that determination is made and the thus exactly when the unlawful presence count is triggered. While in some cases, such as after the end of a grace period, this is fairly straightforward, in many cases it will not be as clear. Does the overstay count start from the date that the DSO/RO terminated or completed the SEVIS record? Or, since the memo states, "the USCIS officer should consider information relating to the alien's immigration history," does this mean that a USCIS officer determines at what point the unlawful presence is triggered? Either way, I can see a multitude of situations in which this will be unjust in the extreme. Here are a few examples of situations that immediately come to mind:</p> <ol style="list-style-type: none"> 1) The automatic SEVIS termination functionality for F-1 students who have exceeded their days of unemployment has not yet been turned on and DSOs have previously been instructed that we are not responsible for determining when someone has exceeded their unemployment limits. It is hardly fair to students who exceed the unemployment limit (I might add, a rule that is completely arbitrary and punitive to students actively trying to find a job 	

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	<p>related to their major but unable to secure an offer within the set number of days allowed by law) and whose SEVIS records remain active to be accumulating days of unlawful presence. It may be years before USCIS has a reason to review the student's SEVIS record and make an official determination that a status violation occurred, at which point the student could easily be subject to an automatic 10 year bar from reentering the U.S.</p> <p>2) P/DSOs and A/ROs are already saddled with the immense responsibility of determining when an F-1, J-1, or M-1 student has violated status. Contrary to popular belief, this determination is not always a black and white issue. While some rules such as the requirement to maintain a full course of study may on the surface appear to be clear cut, any seasoned advisor will tell you differently. For example, the rules regarding distance learning were written years ago, long before the proliferation of hybrid and online courses. Are hybrid courses allowable? Is there a minimum in-person to online ratio that is permitted? The regulation states, "No more than the equivalent of one class or three credits per session ... may be counted toward the full course of study requirement if the class is taken on-line or through distance education and does not require the student's physical attendance for classes, examination or other purposes integral to completion of the class that one online course up to three credit hours is allowable." Some read that to mean that a student may count no more than 3 credit hours in a distance learning format towards their minimum enrollment requirement each semester, but others interpret this rule to mean that only one course, up to three credit hours, is allowable, meaning that if a student takes a 1 credit hour online course, they may not count any other online courses towards their required 12 hours. Absent clear and specific guidelines, schools have had no choice but to create institutional policies regarding grey areas, resulting in an extremely wide variety of practices. A DSO at one school may terminate the SEVIS record of a student considering them to be in violation of status, when, had that same student attended another institution, they might not have considered a violation to have occurred. It is unconscionably cruel to subject students to a penalty that is not applied equally by all schools.</p> <p>3) Larger institutions often hear of smaller institutions failing to fulfill all administrative requirements in SEVIS. This is hardly surprising given that small schools have few resources available to them and DSOs may only handle one international student every few years. Unfortunately, this sometimes results in a SEVIS record not being updated appropriately and the SEVIS record may be automatically terminated due to no fault of the student. While some errors can be remedied with a simple correction or data fix in SEVIS, others cannot, and furthermore, the student and DSO may not even be aware of the problem. Applying unlawful presence to any student with a terminated record without any sort of oversight or appeals</p>	

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	<p>process is punitive in the extreme.</p> <p>4) The memo states that a student who applies for reinstatement is exempt from the unlawful presence provision "provided that the application is ultimately approved." Currently, USCIS processing times for the Form I-539 easily surpass six months. How is it fair to a student who timely files for reinstatement but is ultimately denied to be subject to a 3 year bar on reentering the U.S. simply because USCIS took 8 months to adjudicate his or her petition. The days of unlawful presence should not start accumulating until the date of the petition denial.</p> <p>5) In recent years, USCIS has become much stricter in their interpretation of immigration laws, resulting in increased number of denials for student benefits such as OPT. In many areas such as OPT and CPT, the regulations are vague and schools interpret them differently. One example of USCIS changing their stance on a rule is the STEM OPT rule that has been in effect since May 2016. In January 2018, USCIS surreptitiously updated their website to include a very strict interpretation of third party employment, going so far as to explicitly state that STEM OPT employment is only permitted when the employee is located on site with their supervisor and the company itself. This is not how the final rule reads. Since USCIS doesn't review the Form I-983 as part of authorizing STEM OPT but instead leaves it up to DSO to perform this task, what will happen in instances where, for example, the DSO approves the employment but USCIS later determines the employment to be unacceptable. Will the unlawful presence count apply retroactively to the day the student commenced said employment?</p> <p>I beg that USCIS reconsider such draconian measures which have obviously been proposed with little regard for their ramifications. The vast majority of F, J, and M visa holders that ever have a status violation have done so without intention, and any review of the most common infractions would surely show these violations are slight in nature, resulting in a huge disparity between the "crime" and the punishment. These are people that have spent years in the U.S. building their professional and personal lives; to suddenly bar them from entering the U.S. for a violation that may have been unknown, unclear, or untrue is unreasonable and gratuitous.</p>	
Dinesh Kajjam E.I.T Leidos Utility Engineer Power Delivery Services Power Delivery Services Engineering Solutions phone: [REDACTED] [REDACTED]@[REDACTED]	<p>I would like to submit the following comments in response to the USCIS Proposed Policy Memo "Accrual of Unlawful Presence and F, J, and M Nonimmigrants" (PM-602-1060), posted on May 11, 2018.</p> <p>I am an F-1 international student who has graduated from University at Buffalo. My employer has recently petitioned for my H-1B work visa during the cap-subject application period in April.</p>	

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	<p>My concern with the proposed memorandum is that its new calculation of accrual of unlawful presence may jeopardize my ability to obtain a nonimmigrant visa from a consulate. By essentially equating unlawful presence with failure to maintain proper status, the policy memo puts an undue burden on F-1 students and penalizes them retroactively. The new calculation would render F-1 students unlawfully present dating back to the day after a failure to maintain F-1 status began, rather than from the day of an adverse decision by DHS or an immigration judge.</p> <p>This is an undue burden and disproportionate penalty on us F-1 students because the policies for maintaining proper F-1 status have not always been made uniformly clear to us, or even to our DSOs. As an F-1 student, I rely heavily on my school's DSO in order to maintain valid status, as he or she issues my I-20s, endorses the I-20s for work authorization, and updates my records in the SEVIS system. F-1 students may have engaged in certain employment activities with the full endorsement of their school's DSO, and issuance of an Employment Authorization Document by DHS, only to discover later that the initial grant of work authorization was improper.</p> <p>These inconsistencies are sometimes due to DSO error but are also due to DHS interpretations that may change without warning and get applied retroactively, to our detriment. Updates to USCIS interpretation of employer-employee relationships, for example, may retroactively invalidate an arrangement that I worked under during my OPT training period. The proposed policy memo would result in accrual of unlawful presence retroactively, during a period of time when USCIS policy was different or unclear.</p> <p>Furthermore, the extensive processing times for H-1B change of status petitions, combined with the suspension of premium processing for cap-subject H-1B applications, puts students like me at risk of having accrued unlawful presence for more than six months by the time USCIS has adjudicated my H-1B application and made a determination on whether I have maintained proper status. The extensive service center backlogs, suspension of premium processing, and sudden change in unlawful presence interpretation are all beyond the control of F-1 students. Under this memo, I may be determined to have unknowingly accrued several months of unlawful presence, and a possible 3- or 10-year bar against re-entry, without having possessed the intent to do so, and without any means to remedy my situation once I become aware of it.</p> <p>The accrual of unlawful presence calculation is currently linked to an adverse determination by DHS or an immigration judge (or by the expiration of an I-94) because such a determination actively puts the student on notice that he or she was no longer authorized to stay and/or work in the U.S., and should</p>	

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	<p>depart immediately. The calculation under this proposed memo will put students like me in a position to have possibly accrued several months of unlawful presence unknowingly. It is further exacerbated by the fact that their accrual of unlawful presence may have been endorsed by my school's DSO, the main immigration-related official that I have any contact with and on whom I rely. The application of the proposed memo will unfairly penalize students like me who have acted in good faith, who timely applied for work authorization, and acted according to the policies in effect at the time. It will affect our ability to apply for any other nonimmigrant visa in the U.S., as well as prevent us from applying for a visa at a consulate abroad due to the inadmissibility bar.</p> <p>It is not my intention to overstay my visa or to be unlawfully present in the U.S. I have come to study in the U.S. in order to gain a higher education in America's universities, and to supplement my education through hands-on work experience. My intention is to do so by complying with the relevant immigration regulations and policies. However, when those policies are not always clear, and my studies or work experience are being endorsed by the school's DSO, I feel I should not be penalized retroactively when I have acted in good faith and am informed later that there was a problem with my maintenance of status. I would advocate for the continuation of the current calculation of accrual of unlawful presence for F-1 individuals, which would allow for clear notice to the F-1 student concerning a failure to maintain proper status, a clear start date for the accrual of unlawful presence, and application of a re-entry bar only after remaining in the U.S. for a significant period beyond that notice. This calculation is equitable and avoids disproportionately penalizing students who have acted in good faith, and would allow us an opportunity to remedy our visa status once we become aware of the problem by being able to depart the U.S. as soon as we become aware that unlawful presence has begun to accrue.</p> <p>I urge against the implementation of this proposed policy memo. Thank you for your consideration, time, and support in this matter.</p>	
Ravi Varma [REDACTED]@[REDACTED]	<p>I would like to submit the following comments in response to the USCIS Proposed Policy Memo "Accrual of Unlawful Presence and F, J, and M Nonimmigrants" (PM-602-1060), posted on May 11, 2018.</p> <p>As a citizen writing on behalf of many students who will be effected without their knowledge. My concern with the proposed memorandum is that its new calculation of accrual of unlawful presence may jeopardize a student ability to obtain a nonimmigrant visa from a consulate. By essentially equating unlawful presence with failure to maintain proper status, the policy memo puts an undue burden on F-1 students and penalizes them retroactively. The new calculation would render F-1 students unlawfully present dating back to the day after a failure to maintain F-1 status began, rather</p>	

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	<p>than from the day of an adverse decision by DHS or an immigration judge.</p> <p>This is an undue burden and disproportionate penalty on F-1 students because the policies for maintaining proper F-1 status have not always been made uniformly clear to them, or even to DSOs. As an F-1 student, they rely heavily on school's DSO in order to maintain valid status, as he or she issues I-20s, endorses the I-20s for work authorization, and updates records in the SEVIS system. F-1 students may have engaged in certain employment activities with the full endorsement of their school's DSO, and issuance of an Employment Authorization Document by DHS, only to discover later that the initial grant of work authorization was improper.</p> <p>These inconsistencies are sometimes due to DSO error but are also due to DHS interpretations that may change without warning and get applied retroactively, to their detriment. Updates to USCIS interpretation of employer-employee relationships, for example, may retroactively invalidate an arrangement that student worked under during OPT training period. The proposed policy memo would result in accrual of unlawful presence retroactively, during a period of time when USCIS policy was different or unclear.</p> <p>Furthermore, the extensive processing times for H-1B change of status petitions, combined with the suspension of premium processing for cap-subject H-1B applications, puts students at risk of having accrued unlawful presence for more than six months by the time USCIS has adjudicated H-1B application and made a determination on whether have maintained proper status. The extensive service center backlogs, suspension of premium processing, and sudden change in unlawful presence interpretation are all beyond the control of F-1 students. Under this memo, may be determined to have unknowingly accrued several months of unlawful presence, and a possible 3- or 10-year bar against re-entry, without having possessed the intent to do so, and without any means to remedy situation once student become aware of it.</p> <p>The accrual of unlawful presence calculation is currently linked to an adverse determination by DHS or an immigration judge (or by the expiration of an I-94) because such a determination actively puts the student on notice that he or she was no longer authorized to stay and/or work in the U.S., and should depart immediately. The calculation under this proposed memo will put students in a position to have possibly accrued several months of unlawful presence unknowingly. It is further exacerbated by the fact that their accrual of unlawful presence may have been endorsed by school's DSO, the main immigration-related official that student have any contact with and on whom student rely. The application of the proposed memo will unfairly penalize students who have acted in good faith, who timely applied for work authorization, and acted according to the policies in effect at the time. It will affect their ability to apply for any other nonimmigrant visa in the U.S., as well as prevent those students from applying for a visa at a consulate abroad due to the inadmissibility bar.</p> <p>It is not their intention to overstay in visa or to be unlawfully present in the U.S. they have come to</p>	

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	<p>study in the U.S. in order to gain a higher education in America's universities, and to supplement education through hands-on work experience. My intention is to do so by complying with the relevant immigration regulations and policies. However, when those policies are not always clear, and their studies or work experience are being endorsed by the school's DSO, I feel they should not be penalized retroactively when they have acted in good faith and they have informed later that there was a problem with maintenance of status. I would advocate for the continuation of the current calculation of accrual of unlawful presence for F-1 individuals, which would allow for clear notice to the F-1 student concerning a failure to maintain proper status, a clear start date for the accrual of unlawful presence, and application of a re-entry bar only after remaining in the U.S. for a significant period beyond that notice. This calculation is equitable and avoids disproportionately penalizing students who have acted in good faith, and would allow them an opportunity to remedy their visa status once they become aware of the problem by being able to depart the U.S. as soon as they become aware that unlawful presence has begun to accrue.</p> <p>I urge against the implementation of this proposed policy memo. Thank you for your consideration, time, and support in this matter.</p>	
<p>Fahmid Swaikat [REDACTED]@[REDACTED]</p>	<p>I would like to submit the following comments in response to the USCIS Proposed Policy Memo "Accrual of Unlawful Presence and F, J, and M Nonimmigrants" (PM-602-1060), posted on May 11, 2018.</p> <p>I am an F-1 international student who is currently pursuing a specialized STEM masters degree and am working based on school authorized Practical Training an integral part of my degree program. My employer has recently petitioned for my H-1B work visa during the cap-subject application period in April.</p> <p>My concern with the proposed memorandum is that its new calculation of accrual of unlawful presence may jeopardize my ability to obtain a nonimmigrant visa from a consulate. By essentially equating unlawful presence with failure to maintain proper status, the policy memo puts an undue burden on F-1 students and penalizes them retroactively. The new calculation would render F-1 students unlawfully present dating back to the day after a failure to maintain F-1 status began, rather than from the day of an adverse decision by DHS or an immigration judge.</p> <p>This is an undue burden and disproportionate penalty on us F-1 students because the policies for maintaining proper F-1 status have not always been made uniformly clear to us, or even to our DSOs. As an F-1 student, I rely heavily on my school's DSO in order to maintain valid status, as he or she</p>	

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<p>Manushi Sheth [REDACTED]@[REDACTED]</p>	<p>I would like to submit the following comments in response to the USCIS Proposed Policy Memo "Accrual of Unlawful Presence and F, J, and M Nonimmigrants" (PM-602-1060), posted on May 11, 2018.</p> <p>I am an F-1 international student who has recently graduated from [university] and am working based on Optional Practical Training (OPT). My employer has recently petitioned for my H-1B work visa during the cap-subject application period in April.</p> <p>My concern with the proposed memorandum is that its new calculation of accrual of unlawful presence may jeopardize my ability to obtain a nonimmigrant visa from a consulate. By essentially equating unlawful presence with failure to maintain proper status, the policy memo puts an undue burden on F-1 students and penalizes them retroactively. The new calculation would render F-1 students unlawfully present dating back to the day after a failure to maintain F-1 status began, rather than from the day of an adverse decision by DHS or an immigration judge.</p> <p>This is an undue burden and disproportionate penalty on us F-1 students because the policies for maintaining proper F-1 status have not always been made uniformly clear to us, or even to our DSOs. As an F-1 student, I rely heavily on my school's DSO in order to maintain valid status, as he or she issues my I-20s, endorses the I-20s for work authorization, and updates my records in the SEVIS</p>	

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<p>Parth Parikh [REDACTED]@[REDACTED]</p>	<p>I would like to submit the following comments in response to the USCIS Proposed Policy Memo "Accrual of Unlawful Presence and F, J, and M Nonimmigrants" (PM-602-1060), posted on May 11, 2018.</p> <p>I am an F-1 international student who recently graduated from an accredited University and currently on Optional Practical Training (OPT) work authorization. My employer recently petitioned for my H-1B work visa during the cap-subject application period in April.</p> <p>My concern with the proposed memorandum is that its new calculation of accrual of unlawful presence may jeopardize my ability to obtain a non-immigrant visa from a consulate. By essentially equating unlawful presence with failure to maintain proper status, the policy memo puts an undue burden on F-1 students and penalizes them retroactively. The new calculation would render F-1 students unlawfully present dating back to the day after a failure to maintain F-1 status began, rather than from the day of an adverse decision by DHS or an immigration judge.</p> <p>This is an undue burden and disproportionate penalty on us F-1 students because the policies for maintaining proper F-1 status have not always been made uniformly clear to us, or even to our DSOs. As an F-1 student, I rely heavily on my school's DSO in order to maintain valid status, as he or she issues my I-20s, endorses the I-20s for work authorization, and updates my records in the SEVIS system. F-1 students may have engaged in certain employment activities with the full endorsement of</p>	

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	<p>their school's DSO, and issuance of an Employment Authorization Document by DHS, only to discover later that the initial grant of work authorization was improper.</p> <p>These inconsistencies are sometimes due to DSO error but are also due to DHS interpretations that may change without warning and get applied retroactively, to our detriment. Updates to USCIS interpretation of employer-employee relationships, for example, may retroactively invalidate an arrangement that I worked under during my OPT training period. The proposed policy memo would result in accrual of unlawful presence retroactively, during a period of time when USCIS policy was different or unclear.</p> <p>Furthermore, the extensive processing times for H-1B change of status petitions, combined with the suspension of premium processing for cap-subject H-1B applications, puts students like me at risk of having accrued unlawful presence for more than six months by the time USCIS has adjudicated my H-1B application and made a determination on whether I have maintained proper status. The extensive service center backlogs, suspension of premium processing, and sudden change in unlawful presence interpretation are all beyond the control of F-1 students. Under this memo, I may be determined to have unknowingly accrued several months of unlawful presence, and a possible 3- or 10-year bar against re-entry, without having possessed the intent to do so, and without any means to remedy my situation once I become aware of it.</p> <p>The accrual of unlawful presence calculation is currently linked to an adverse determination by DHS or an immigration judge (or by the expiration of an I-94) because such a determination actively puts the student on notice that he or she was no longer authorized to stay and/or work in the U.S., and should depart immediately. The calculation under this proposed memo will put students like me in a position to have possibly accrued several months of unlawful presence unknowingly. It is further exacerbated by the fact that their accrual of unlawful presence may have been endorsed by my school's DSO, the main immigration-related official that I have any contact with and on whom I rely. The application of the proposed memo will unfairly penalize students like me who have acted in good faith, who timely applied for work authorization, and acted according to the policies in effect at the time. It will affect our ability to apply for any other nonimmigrant visa in the U.S., as well as prevent us from applying for a visa at a consulate abroad due to the inadmissibility bar.</p> <p>It is not my intention to overstay my visa or to be unlawfully present in the U.S. I have come to study in the U.S. in order to gain a higher education in America's universities, and to supplement my education through hands-on work experience. My intention is to do so by complying with the relevant</p>	

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	<p>immigration regulations and policies. However, when those policies are not always clear, and my studies or work experience are being endorsed by the school's DSO, I feel I should not be penalized retroactively when I have acted in good faith and am informed later that there was a problem with my maintenance of status. I would advocate for the continuation of the current calculation of accrual of unlawful presence for F-1 individuals, which would allow for clear notice to the F-1 student concerning a failure to maintain proper status, a clear start date for the accrual of unlawful presence, and application of a re-entry bar only after remaining in the U.S. for a significant period beyond that notice. This calculation is equitable and avoids disproportionately penalizing students who have acted in good faith, and would allow us an opportunity to remedy our visa status once we become aware of the problem by being able to depart the U.S. as soon as we become aware that unlawful presence has begun to accrue.</p> <p>I urge against the implementation of this proposed policy memo. Thank you for your consideration, time, and support in this matter.</p>	
<p>Sravan Kumar [REDACTED]@[REDACTED]</p>	<p>Many students are choosing to pursue education after expiration of current status, I have few friends who did this because of delays in visa processing , while awaiting for approvals. But they are following every rule set forth by USCIS and DHS.</p> <p>I am currently pursuing Masters in busuness administration in Virginia. I did a master's in computer sciences in Ohio. My plan to do an MBA did not start afywr comoleting masters in computer sciences, I decided to do MBA at first but I needed thorough knowledge of IT Business. while I was working in my practical training my employer did file for My H1B and before I got a decision, I applied for MBA, since i like the education system in United States.</p> <p>I am currently married to a H1B worker , that would make me H4 dependent, but I choose to study and skill up instead of sitting idle at home.</p> <p>I didn't intend to violate any law when I choose to do MBA. I followed process to apply to college and get admission and have been attending classes maintaining full time student status. I am.hoping to complete my course by end of 2019.</p> <p>atleast people who are not repeating same courses should be ommitted from this policy.</p> <p>students should be given fair chance to pursue higher education in the fields of their interests.</p>	

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<p>Karthik Reddy [REDACTED]@[REDACTED]</p>	<p>Students who are maintaining status should not be harassed with policies that puts our stats in jeopardy.</p> <p>I would like to submit the following comments in response to the USCIS Proposed Policy Memo "Accrual of Unlawful Presence and F, J, and M Nonimmigrants" (PM-602-1060), posted on May 11, 2018.</p> <p>I am an F-1 international student who has recently graduated from [university] and am working based on Optional Practical Training (OPT). My employer has recently petitioned for my H-1B work visa during the cap-subject application period in April.</p> <p>My concern with the proposed memorandum is that its new calculation of accrual of unlawful presence may jeopardize my ability to obtain a nonimmigrant visa from a consulate. By essentially equating unlawful presence with failure to maintain proper status, the policy memo puts an undue burden on F-1 students and penalizes them retroactively. The new calculation would render F-1 students unlawfully present dating back to the day after a failure to maintain F-1 status began, rather than from the day of an adverse decision by DHS or an immigration judge.</p> <p>This is an undue burden and disproportionate penalty on us F-1 students because the policies for maintaining proper F-1 status have not always been made uniformly clear to us, or even to our DSOs. As an F-1 student, I rely heavily on my school's DSO in order to maintain valid status, as he or she issues my I-20s, endorses the I-20s for work authorization, and updates my records in the SEVIS system. F-1 students may have engaged in certain employment activities with the full endorsement of their school's DSO, and issuance of an Employment Authorization Document by DHS, only to discover later that the initial grant of work authorization was improper.</p> <p>These inconsistencies are sometimes due to DSO error but are also due to DHS interpretations that may change without warning and get applied retroactively, to our detriment. Updates to USCIS interpretation of employer-employee relationships, for example, may retroactively invalidate an arrangement that I worked under during my OPT training period. The proposed policy memo would result in accrual of unlawful presence retroactively, during a period of time when USCIS policy was different or unclear.</p> <p>Furthermore, the extensive processing times for H-1B change of status petitions, combined with the suspension of premium processing for cap-subject H-1B applications, puts students like me at risk of</p>	

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	<p>having accrued unlawful presence for more than six months by the time USCIS has adjudicated my H-1B application and made a determination on whether I have maintained proper status. The extensive service center backlogs, suspension of premium processing, and sudden change in unlawful presence interpretation are all beyond the control of F-1 students. Under this memo, I may be determined to have unknowingly accrued several months of unlawful presence, and a possible 3- or 10-year bar against re-entry, without having possessed the intent to do so, and without any means to remedy my situation once I become aware of it.</p> <p>The accrual of unlawful presence calculation is currently linked to an adverse determination by DHS or an immigration judge (or by the expiration of an I-94) because such a determination actively puts the student on notice that he or she was no longer authorized to stay and/or work in the U.S., and should depart immediately. The calculation under this proposed memo will put students like me in a position to have possibly accrued several months of unlawful presence unknowingly. It is further exacerbated by the fact that their accrual of unlawful presence may have been endorsed by my school's DSO, the main immigration-related official that I have any contact with and on whom I rely. The application of the proposed memo will unfairly penalize students like me who have acted in good faith, who timely applied for work authorization, and acted according to the policies in effect at the time. It will affect our ability to apply for any other nonimmigrant visa in the U.S., as well as prevent us from applying for a visa at a consulate abroad due to the inadmissibility bar.</p> <p>It is not my intention to overstay my visa or to be unlawfully present in the U.S. I have come to study in the U.S. in order to gain a higher education in America's universities, and to supplement my education through hands-on work experience. My intention is to do so by complying with the relevant immigration regulations and policies. However, when those policies are not always clear, and my studies or work experience are being endorsed by the school's DSO, I feel I should not be penalized retroactively when I have acted in good faith and am informed later that there was a problem with my maintenance of status. I would advocate for the continuation of the current calculation of accrual of unlawful presence for F-1 individuals, which would allow for clear notice to the F-1 student concerning a failure to maintain proper status, a clear start date for the accrual of unlawful presence, and application of a re-entry bar only after remaining in the U.S. for a significant period beyond that notice. This calculation is equitable and avoids disproportionately penalizing students who have acted in good faith, and would allow us an opportunity to remedy our visa status once we become aware of the problem by being able to depart the U.S. as soon as we become aware that unlawful presence has begun to accrue.</p>	

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	I urge against the implementation of this proposed policy memo. Thank you for your consideration, time, and support in this matter.	
<p>Gaurav Tripathi Ph: [REDACTED] [REDACTED]@[REDACTED]</p>	<p>I would like to submit the following comments in response to the USCIS Proposed Policy Memo "Accrual of Unlawful Presence and F, J, and M Nonimmigrants" (PM-602-1060), posted on May 11, 2018.</p> <p>I am an F-1 international student who has recently graduated from [university] and am working based on Optional Practical Training (OPT). My employer has recently petitioned for my H-1B work visa during the cap-subject application period in April.</p> <p>My concern with the proposed memorandum is that its new calculation of accrual of unlawful presence may jeopardize my ability to obtain a nonimmigrant visa from a consulate. By essentially equating unlawful presence with failure to maintain proper status, the policy memo puts an undue burden on F-1 students and penalizes them retroactively. The new calculation would render F-1 students unlawfully present dating back to the day after a failure to maintain F-1 status began, rather than from the day of an adverse decision by DHS or an immigration judge.</p> <p>This is an undue burden and disproportionate penalty on us F-1 students because the policies for maintaining proper F-1 status have not always been made uniformly clear to us, or even to our DSOs. As an F-1 student, I rely heavily on my school's DSO in order to maintain valid status, as he or she issues my I-20s, endorses the I-20s for work authorization, and updates my records in the SEVIS system. F-1 students may have engaged in certain employment activities with the full endorsement of their school's DSO, and issuance of an Employment Authorization Document by DHS, only to discover later that the initial grant of work authorization was improper.</p> <p>These inconsistencies are sometimes due to DSO error but are also due to DHS interpretations that may change without warning and get applied retroactively, to our detriment. Updates to USCIS interpretation of employer-employee relationships, for example, may retroactively invalidate an arrangement that I worked under during my OPT training period. The proposed policy memo would result in accrual of unlawful presence retroactively, during a period of time when USCIS policy was different or unclear.</p> <p>Furthermore, the extensive processing times for H-1B change of status petitions, combined with the suspension of premium processing for cap-subject H-1B applications, puts students like me at risk of having accrued unlawful presence for more than six months by the time USCIS has adjudicated my H-1B application and made a determination on whether I have maintained proper status. The extensive service center backlogs, suspension of premium processing, and sudden change in unlawful presence interpretation are all beyond the control of F-1 students. Under this memo, I may be determined to have unknowingly accrued several months of unlawful presence, and a possible 3- or 10-year bar against re-entry, without having possessed the intent to do so, and without any means to remedy my situation once</p>	

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	<p>I become aware of it.</p> <p>The accrual of unlawful presence calculation is currently linked to an adverse determination by DHS or an immigration judge (or by the expiration of an I-94) because such a determination actively puts the student on notice that he or she was no longer authorized to stay and/or work in the U.S., and should depart immediately. The calculation under this proposed memo will put students like me in a position to have possibly accrued several months of unlawful presence unknowingly. It is further exacerbated by the fact that their accrual of unlawful presence may have been endorsed by my school's DSO, the main immigration-related official that I have any contact with and on whom I rely. The application of the proposed memo will unfairly penalize students like me who have acted in good faith, who timely applied for work authorization, and acted according to the policies in effect at the time. It will affect our ability to apply for any other nonimmigrant visa in the U.S., as well as prevent us from applying for a visa at a consulate abroad due to the inadmissibility bar.</p> <p>It is not my intention to overstay my visa or to be unlawfully present in the U.S. I have come to study in the U.S. in order to gain a higher education in America's universities, and to supplement my education through hands-on work experience. My intention is to do so by complying with the relevant immigration regulations and policies. However, when those policies are not always clear, and my studies or work experience are being endorsed by the school's DSO, I feel I should not be penalized retroactively when I have acted in good faith and am informed later that there was a problem with my maintenance of status. I would advocate for the continuation of the current calculation of accrual of unlawful presence for F-1 individuals, which would allow for clear notice to the F-1 student concerning a failure to maintain proper status, a clear start date for the accrual of unlawful presence, and application of a re-entry bar only after remaining in the U.S. for a significant period beyond that notice. This calculation is equitable and avoids disproportionately penalizing students who have acted in good faith, and would allow us an opportunity to remedy our visa status once we become aware of the problem by being able to depart the U.S. as soon as we become aware that unlawful presence has begun to accrue.</p> <p>I urge against the implementation of this proposed policy memo. Thank you for your consideration, time, and support in this matter.</p>	
Isha C. [REDACTED]@[REDACTED]	<p>I would like to submit the following comments in response to the USCIS Proposed Policy Memo "Accrual of Unlawful Presence and F, J, and M Nonimmigrants" (PM-602-1060), posted on May 11, 2018.</p> <p>I am an F-1 international student who has graduated from one of the finest universities for my coursework and am working based on STEM OPT work authorization. My employer has recently petitioned for my H-1B work visa during the cap-subject application period in April and am waiting for lottery results.</p>	



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	<p>My concern with the proposed memorandum is that I am working for a technology and management company where in the business model setting lets the employee work from the client location. I have been working at the same client location for more than a year now with my managers from my organization giving me work, signing my I-765 and evaluating my work. Also, I have kept my SEVP and DSO updated of my working location.</p> <p>When I moved to United states for pursuing higher studies, I aimed to be a technology consultant so that I can train myself through OPT in different domains. This requires working for different clients at their offices to understand and propose solutions.</p> <p>I want to abide by the law as I always did and my organization is now trying to move me to their headquarters, but the question remains that if i am updating my location, have a valid authorization to work, why I am being devoid of my opportunities. All big management consulting and big 4 accounting firms works in the same fashion.</p> <p>It would be ideal if you can let us complete our STEM OPT the way it was, because there is no other way for me to work until I have my H1B. H1B as you know is also a lottery system and I have been waiting 2 years in a row to see if I have a luck in getting one. I am hopeful that you will consider our aspirations.</p> <p>I urge against the implementation of this proposed policy memo. Thank you for your consideration, time, and support in this matter.</p>	
Jennifer Boe [REDACTED]@[REDACTED]	<p>I am writing in regard to the recommendations made in "Policy Memoranda: Accrual of Unlawful Presence and F, J, and M Nonimmigrants (PM-602-1060)." These proposals represent a radical change in USCIS's interpretation and application of the regulations related to the accrual of unlawful presence by those in student (F nonimmigrant), exchange visitor (J nonimmigrant), or vocational student (M nonimmigrant) status and their dependents while in the United States.</p> <p>I work at the University of Minnesota, and we have international students from more than 135 nations and faculty from across the globe. The international students, researchers, staff and faculty on our campuses bring unique experiences and perspectives to our classrooms, important ideas for discovery and innovation to our research labs, and exciting leadership to our campus community.</p> <p>As a DSO (Designated School Official, I was alarmed to read these proposed changes. A great deal of</p>	

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	<p>my daily work consists of advising international students and scholars on how to maintain their visa status (and that of their dependents). This is something that the vast majority of international students deeply and sincerely want to do, and this means they need to remain aware of visa regulations while also balancing the demands all students experience along with their institution's requirements.</p> <p>There have been significant discussions amongst DSOs and AROs since this memorandum was released regarding how we will assist F/J/M visa holders in understanding these new policies without inadvertently engaging in the unauthorized practice of law. While changes in regulations are to be expected, these proposed changes are especially problematic because they are a departure from the long-standing, common sense interpretation of visa regulations that has been in place for over 20 years, and it creates a system where F/J/M visa holders may be found to have violated their visa status years after the violation supposedly occurred—something that is especially troubling since this memorandum attaches the possibility that this violation could result in individuals being barred from entering the U.S. for three years, ten years, or permanently.</p> <p>Although the announcement regarding these changes comes with sufficient notice for individuals who are currently out of status to take steps to remedy their visa status before they begin accruing unlawful presence, this new interpretation will cause a great deal of uncertainty for F/J/M visa holders moving forward. Here are some specific examples of some problems DSOs/AROs foresee with the implementation of this memoranda:</p> <ol style="list-style-type: none"> 1. Recent SEVP Portal Release: SEVP recently implemented a Portal through which F-1 students on post-completion optional practical training (OPT) or STEM OPT are allowed to report changes to their personal and/or employment information, but there have been issues with the system. Students are required to report these changes with ten days, but periodic problems with SEVIS and the Portal have resulted in incomplete information being available to students and instances when students have not been able to access the Portal. Additionally, some students have been confused about what information to enter and how to correctly enter it. All of this has resulted in incomplete and inaccurate data being reported to SEVIS through the Portal despite the best efforts of F-1 visa holders to report their information. Therefore, if USCIS relies on information from SEVIS (something the Policy memo mentions as a likely source of information for making decisions about violations of status), it is likely that there will be students judged to have violated their status based on this bad data. <p>While DSOs/AROs and others have been, historically, been able to help students resolve these</p>	

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	<p>data issues, the new interpretation of the regulations could mean that these student could be judged to have violated their status and could be be accruing unlawful presence without realizing it.</p> <p>2. Changes to Regulations Causing Previously Approved Actions to Become Violations: The student and scholar visa system (SEVIS) is set up so that school officials bear a great deal of responsibility for assisting F/J/M visa holders to maintain their status. As DSOs/AROs, we do our best communicate with our students when there are changes to visa regulations and regulatory interpretations. This is not an easy task—especially when changes to regulations or regulatory interpretations require that we tell students something that is the reverse of what we previously correctly advised them.</p> <p>In instances like the recent announcement restricting 3rd party employment for students on STEM OPT, it is very possible students will believe that they have done everything necessary to comply with the rules, only to apply to renew a visa or to change visa status in the future and be told that their actions (permissible when they started, but now not allowed due to changes in regulatory interpretations) were a violation of their status, and they have since accrued unlawful presence, barring them from changing visa status or re-entering the U.S.</p> <p>These are only two recent examples of actions that could result in international students accruing unlawful presence despite their attempts to follow the rules. We foresee many additional problems and unintended consequences that will result from such a large and dramatic shift in regulatory interpretation.</p> <p>In conclusion The USCIS press release for this memorandum quotes USCIS Director L. Francis Cissna as saying, “USCIS is dedicated to our mission of ensuring the integrity of the immigration system. F, J, and M nonimmigrants are admitted to the United States for a specific purpose, and when that purpose has ended, we expect them to depart, or to obtain another, lawful immigration status.” This change, however, will not contribute meaningfully to that objective. Instead, it will likely result in confusion that will mean well-meaning international students and exchange visitors could be found to have accrued unlawful presence due to innocent mistakes or misunderstandings of changing regulations. Due to the strict bars that will be applied to these individuals due to these changes, these misunderstandings could have severe consequences.</p> <p>We are at a point in time where our international students can choose to study anywhere in the world.</p>	

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	<p>Many international students who enroll at U.S. institutions are the best of their classes at home, and they receive offers to attend institutions around the world. They choose to come to the United States because they have determined an institution is the best option for them to pursue their chosen field of study. While here, they excel in their classes, and they provide new perspectives and experiences to their classmates and the broader university community.</p> <p>If we want to ensure the students fulfill the “specific purpose” they receive their visa (obtaining an education at a U.S. institution), we must ensure our laws and regulations are structured and implemented in a fair and transparent manner. We must work to limit uncertainty so that students can focus on learning instead of tracking constantly changing regulations. This new policy has the opposite result.</p>	
Eileen Qu [REDACTED]@[REDACTED]	<p>I would like to submit the following comments in response to the USCIS Proposed Policy Memo “Accrual of Unlawful Presence and F, J, and M Nonimmigrants” (PM-602-1060), posted on May 11, 2018.</p> <p>I am an F-1 international student who has recently graduated from [university] and am working based on Optional Practical Training (OPT). My employer has recently petitioned for my H-1B work visa during the cap-subject application period in April.</p> <p>My concern with the proposed memorandum is that its new calculation of accrual of unlawful presence may jeopardize my ability to obtain a nonimmigrant visa from a consulate. By essentially equating unlawful presence with failure to maintain proper status, the policy memo puts an undue burden on F-1 students and penalizes them retroactively. The new calculation would render F-1 students unlawfully present dating back to the day after a failure to maintain F-1 status began, rather than from the day of an adverse decision by DHS or an immigration judge.</p> <p>This is an undue burden and disproportionate penalty on us F-1 students because the policies for maintaining proper F-1 status have not always been made uniformly clear to us, or even to our DSOs. As an F-1 student, I rely heavily on my school’s DSO in order to maintain valid status, as he or she issues my I-20s, endorses the I-20s for work authorization, and updates my records in the SEVIS system. F-1 students may have engaged in certain employment activities with the full endorsement of their school’s DSO, and issuance of an Employment Authorization Document by DHS, only to discover later that the initial grant of work authorization was improper.</p>	

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	<p>These inconsistencies are sometimes due to DSO error but are also due to DHS interpretations that may change without warning and get applied retroactively, to our detriment. Updates to USCIS interpretation of employer-employee relationships, for example, may retroactively invalidate an arrangement that I worked under during my OPT training period. The proposed policy memo would result in accrual of unlawful presence retroactively, during a period of time when USCIS policy was different or unclear.</p> <p>Furthermore, the extensive processing times for H-1B change of status petitions, combined with the suspension of premium processing for cap-subject H-1B applications, puts students like me at risk of having accrued unlawful presence for more than six months by the time USCIS has adjudicated my H-1B application and made a determination on whether I have maintained proper status. The extensive service center backlogs, suspension of premium processing, and sudden change in unlawful presence interpretation are all beyond the control of F-1 students. Under this memo, I may be determined to have unknowingly accrued several months of unlawful presence, and a possible 3- or 10-year bar against re-entry, without having possessed the intent to do so, and without any means to remedy my situation once I become aware of it.</p> <p>The accrual of unlawful presence calculation is currently linked to an adverse determination by DHS or an immigration judge (or by the expiration of an I-94) because such a determination actively puts the student on notice that he or she was no longer authorized to stay and/or work in the U.S., and should depart immediately. The calculation under this proposed memo will put students like me in a position to have possibly accrued several months of unlawful presence unknowingly. It is further exacerbated by the fact that their accrual of unlawful presence may have been endorsed by my school's DSO, the main immigration-related official that I have any contact with and on whom I rely. The application of the proposed memo will unfairly penalize students like me who have acted in good faith, who timely applied for work authorization, and acted according to the policies in effect at the time. It will affect our ability to apply for any other nonimmigrant visa in the U.S., as well as prevent us from applying for a visa at a consulate abroad due to the inadmissibility bar.</p> <p>It is not my intention to overstay my visa or to be unlawfully present in the U.S. I have come to study in the U.S. in order to gain a higher education in America's universities, and to supplement my education through hands-on work experience. My intention is to do so by complying with the relevant immigration regulations and policies. However, when those policies are not always clear, and my studies or work experience are being endorsed by the school's DSO, I feel I should not be penalized retroactively when I have acted in good faith and am informed later that there was a problem with my</p>	

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	<p>maintenance of status. I would advocate for the continuation of the current calculation of accrual of unlawful presence for F-1 individuals, which would allow for clear notice to the F-1 student concerning a failure to maintain proper status, a clear start date for the accrual of unlawful presence, and application of a re-entry bar only after remaining in the U.S. for a significant period beyond that notice. This calculation is equitable and avoids disproportionately penalizing students who have acted in good faith, and would allow us an opportunity to remedy our visa status once we become aware of the problem by being able to depart the U.S. as soon as we become aware that unlawful presence has begun to accrue.</p> <p>I urge against the implementation of this proposed policy memo. Thank you for your consideration, time, and support in this matter.</p>	
Aya Maruyama  @ 	<p>I am writing in regard to the recommendations made in "Policy Memoranda: Accrual of Unlawful Presence and F, J, and M Nonimmigrants (PM-602-1060)." These proposals represent a radical change in USCIS's interpretation and application of the regulations related to the accrual of unlawful presence by those in student (F nonimmigrant), exchange visitor (J nonimmigrant), or vocational student (M nonimmigrant) status and their dependents while in the United States.</p> <p>I work at the University of Minnesota, and we have international students from more than 135 nations and faculty from across the globe. The international students, researchers, staff and faculty on our campuses bring unique experiences and perspectives to our classrooms, important ideas for discovery and innovation to our research labs, and exciting leadership to our campus community.</p> <p>As a International Student Advisor, I was alarmed to read these proposed changes. A great deal of my daily work consists of advising international students and scholars on how to maintain their visa status (and that of their dependents). This is something that the vast majority of international students deeply and sincerely want to do, and this means they need to remain aware of visa regulations while also balancing the demands all students experience along with their institution's requirements.</p> <p>There have been significant discussions amongst International Student Advisors since this memorandum was released regarding how we will assist F/J/M visa holders in understanding these new policies without inadvertently engaging in the unauthorized practice of law. While changes in regulations are to be expected, these proposed changes are especially problematic because they are a departure from the long-standing, common sense interpretation of visa regulations that has been in place for over 20 years, and it creates a system where F/J/M visa holders may be found to have violated their visa status years after the violation supposedly occurred—something that is especially troubling</p>	

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	<p>since this memorandum attaches the possibility that this violation could result in individuals being barred from entering the U.S. for three years, ten years, or permanently.</p> <p>Although the announcement regarding these changes comes with sufficient notice for individuals who are currently out of status to take steps to remedy their visa status before they begin accruing unlawful presence, this new interpretation will cause a great deal of uncertainty for F/J/M visa holders moving forward. Here are some specific examples of some problems International Student Advisors foresee with the implementation of this memoranda:</p> <ol style="list-style-type: none"> 1. Recent SEVP Portal Release: SEVP recently implemented a Portal through which F-1 students on post-completion optional practical training (OPT) or STEM OPT are allowed to report changes to their personal and/or employment information, but there have been issues with the system. Students are required to report these changes with ten days, but periodic problems with SEVIS and the Portal have resulted in incomplete information being available to students and instances when students have not been able to access the Portal. Additionally, some students have been confused about what information to enter and how to correctly enter it. All of this has resulted in incomplete and inaccurate data being reported to SEVIS through the Portal despite the best efforts of F-1 visa holders to report their information. Therefore, if USCIS relies on information from SEVIS (something the Policy memo mentions as a likely source of information for making decisions about violations of status), it is likely that there will be students judged to have violated their status based on this bad data. <p>While International Student Advisors and others have been, historically, been able to help students resolve these data issues, the new interpretation of the regulations could mean that these student could be judged to have violated their status and could be be accruing unlawful presence without realizing it.</p> <ol style="list-style-type: none"> 2. Changes to Regulations Causing Previously Approved Actions to Become Violations: The student and scholar visa system (SEVIS) is set up so that school officials bear a great deal of responsibility for assisting F/J/M visa holders to maintain their status. As International Student Advisors, we do our best communicate with our students when there are changes to visa regulations and regulatory interpretations. This is not an easy task—especially when changes to regulations or regulatory interpretations require that we tell students something that is the reverse of what we previously correctly advised them. <p>In instances like the recent announcement restricting 3rd party employment for students on</p>	

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	<p>STEM OPT, it is very possible students will believe that they have done everything necessary to comply with the rules, only to apply to renew a visa or to change visa status in the future and be told that their actions (permissible when they started, but now not allowed due to changes in regulatory interpretations) were a violation of their status, and they have since accrued unlawful presence, barring them from changing visa status or re-entering the U.S.</p> <p>These are only two recent examples of actions that could result in international students accruing unlawful presence despite their attempts to follow the rules. We foresee many additional problems and unintended consequences that will result from such a large and dramatic shift in regulatory interpretation.</p> <p>In conclusion</p> <p>The USCIS press release for this memorandum quotes USCIS Director L. Francis Cissna as saying, "USCIS is dedicated to our mission of ensuring the integrity of the immigration system. F, J, and M nonimmigrants are admitted to the United States for a specific purpose, and when that purpose has ended, we expect them to depart, or to obtain another, lawful immigration status." This change, however, will not contribute meaningfully to that objective. Instead, it will likely result in confusion that will mean well-meaning international students and exchange visitors could be found to have accrued unlawful presence due to innocent mistakes or misunderstandings of changing regulations. Due to the strict bars that will be applied to these individuals due to these changes, these misunderstandings could have severe consequences.</p> <p>We are at a point in time where our international students can choose to study anywhere in the world. Many international students who enroll at U.S. institutions are the best of their classes at home, and they receive offers to attend institutions around the world. They choose to come to the United States because they have determined an institution is the best option for them to pursue their chosen field of study. While here, they excel in their classes, and they provide new perspectives and experiences to their classmates and the broader university community.</p> <p>If we want to ensure the students fulfill the "specific purpose" they receive their visa (obtaining an education at a U.S. institution), we must ensure our laws and regulations are structured and implemented in a fair and transparent manner. We must work to limit uncertainty so that students can focus on learning instead of tracking constantly changing regulations. This new policy has the opposite</p>	

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	<p>result.</p> <p>Recommendations</p> <p>I urge you to take these concerns into consideration and rather than making the proposed changes, consider the following recommendations suggested by NAFSA (Association of International Educators):</p> <ul style="list-style-type: none"> · Leave in place the current policy, which has served for over 20 years. Neither DHS nor legacy INS ever published regulations to implement this important area of law. If the agency wishes to implement such a drastic change to longstanding common interpretation of the law, it must be done through the notice and comment process. · Do not implement any policy change until implementation has been fully coordinated with the Department of State and other DHS units such as CBP and SEVP. · Exclude from the unlawful presence count any status violations that occurred under color of law, to avoid “gotcha” scenarios, where the student reasonably relied on the authorizations granted. For example, curricular practical training authorized in SEVIS that DHS later determines may have been improperly given, should not start the unlawful presence “clock” until DHS or an immigration judge makes a formal status determination. · Apply the change of status/extension of stay tolling rules to reinstatement applications. · Expand the sections describing examples where F, M, and J nonimmigrants “do not accrue unlawful presence in certain situations.” [draft Adjudicator’s Field Manual 40.9.2(b)(1)(E)(iii)]. 	
<p>Betsy S. Madden, Ph.D. Senior International Counselor International Student and Scholar Services University of Minnesota [REDACTED] [REDACTED] Minneapolis, MN Email: [REDACTED]@[REDACTED] Tel: [REDACTED]</p>	<p>I am writing in regard to the recommendations made in “Policy Memoranda: Accrual of Unlawful Presence and F, J, and M Nonimmigrants (PM-602-1060).” These proposals represent a radical change in USCIS’s interpretation and application of the regulations related to the accrual of unlawful presence by those in student (F nonimmigrant), exchange visitor (J nonimmigrant), or vocational student (M nonimmigrant) status and their dependents while in the United States.</p> <p>I work at the University of Minnesota, and we have international students from more than 135 nations and faculty, staff, and scholars from across the globe. The international students, researchers, staff and faculty on our campuses bring unique experiences and perspectives to our classrooms, important ideas for discovery and innovation to our research labs, and exciting leadership to our campus community.</p> <p>As a DSO (Designated School Official) and ARO (Alternate Responsible Officer), I was alarmed to read these proposed changes. A great deal of my daily work consists of advising international students</p>	

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	<p>and scholars on how to maintain their visa status (and that of their dependents). This is something that the vast majority of international students deeply and sincerely want to do, and this means they need to remain aware of visa regulations while also balancing the demands all students experience along with their institution's requirements.</p> <p>There have been significant discussions amongst DSOs and AROs since this memorandum was released regarding how we will assist F/J/M visa holders in understanding these new policies without inadvertently engaging in the unauthorized practice of law. While changes in regulations are to be expected, these proposed changes are especially problematic because they are a departure from the long-standing, common sense interpretation of visa regulations that has been in place for over 20 years, and it creates a system where F/J/M visa holders may be found to have violated their visa status years after the violation supposedly occurred—something that is especially troubling since this memorandum attaches the possibility that this violation could result in individuals being barred from entering the U.S. for three years, ten years, or permanently.</p> <p>Although the announcement regarding these changes comes with sufficient notice for individuals who are currently out of status to take steps to remedy their visa status before they begin accruing unlawful presence, this new interpretation will cause a great deal of uncertainty for F/J/M visa holders moving forward. Here are some specific examples of some problems DSOs/AROs foresee with the implementation of this memoranda:</p> <ol style="list-style-type: none"> 1. Recent SEVP Portal Release: SEVP recently implemented a Portal through which F-1 students on post-completion optional practical training (OPT) or STEM OPT are allowed to report changes to their personal and/or employment information, but there have been issues with the system. Students are required to report these changes with ten days, but periodic problems with SEVIS and the Portal have resulted in incomplete information being available to students and instances when students have not been able to access the Portal. Additionally, some students have been confused about what information to enter and how to correctly enter it. All of this has resulted in incomplete and inaccurate data being reported to SEVIS through the Portal despite the best efforts of F-1 visa holders to report their information. Therefore, if USCIS relies on information from SEVIS (something the Policy memo mentions as a likely source of information for making decisions about violations of status), it is likely that there will be students judged to have violated their status based on this bad data. <p>While DSOs/AROs and others have been, historically, been able to help students resolve these</p>	

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	<p>data issues, the new interpretation of the regulations could mean that these student could be judged to have violated their status and could be accruing unlawful presence without realizing it.</p> <p>2. Changes to Regulations Causing Previously Approved Actions to Become Violations: The student and scholar visa system (SEVIS) is set up so that school officials bear a great deal of responsibility for assisting F/J/M visa holders to maintain their status. As DSOs/AROs, we do our best communicate with our students when there are changes to visa regulations and regulatory interpretations. This is not an easy task—especially when changes to regulations or regulatory interpretations require that we tell students something that is the reverse of what we previously correctly advised them.</p> <p>In instances like the recent announcement restricting 3rd party employment for students on STEM OPT, it is very possible students will believe that they have done everything necessary to comply with the rules, only to apply to renew a visa or to change visa status in the future and be told that their actions (permissible when they started, but now not allowed due to changes in regulatory interpretations) were a violation of their status, and they have since accrued unlawful presence, barring them from changing visa status or re-entering the U.S</p> <p>3. Delays in adjudication causing re entry bar: Long USCIS adjudication times may lead to someone becoming subject to the unlawful presence penalties in any case that is ultimately denied. For example, consider a student who registers for fewer classes than she should have one semester, which leads her school to terminate her SEVIS record. In good faith, the student registers for a full course of study the next semester, and applies in good faith to USCIS to reinstate her student status. It is not uncommon for a USCIS Service Center to take six months or longer to adjudicate an application for reinstatement to student status. Under current USCIS policy, if USCIS ultimately denies her reinstatement the student would start counting unlawful presence as of the date of the denial, which gives sufficient time to either make arrangements to leave the country, or possibly to ask USCIS to reconsider its decision. <i>In the proposed policy, virtually all students whose reinstatement applications are denied would find themselves subject to at least the 3-year bar, merely because USCIS takes so long to adjudicate applications for reinstatement.</i> In addition, a student or exchange visitor might not even know that he or she was in violation of status until DHS makes a formal determination of that. If the unlawful presence “clock” is seen to start at some distant time in the past in such cases, any window for departing the country will have passed.</p>	

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	<p>These are only three examples of actions that could result in international students accruing unlawful presence despite their attempts to follow the rules or request forgiveness for a mistake. We foresee many additional problems and unintended consequences that will result from such a large and dramatic shift in regulatory interpretation.</p> <p>In conclusion</p> <p>The USCIS press release for this memorandum quotes USCIS Director L. Francis Cissna as saying, "USCIS is dedicated to our mission of ensuring the integrity of the immigration system. F, J, and M nonimmigrants are admitted to the United States for a specific purpose, and when that purpose has ended, we expect them to depart, or to obtain another, lawful immigration status." This change, however, will not contribute meaningfully to that objective. Instead, it will likely result in confusion that will mean well-meaning international students and exchange visitors could be found to have accrued unlawful presence due to innocent mistakes or misunderstandings of changing regulations. Due to the strict bars that will be applied to these individuals due to these changes, these misunderstandings could have severe consequences.</p> <p>We are at a point in time where our international students can choose to study anywhere in the world. Many international students who enroll at U.S. institutions are the best of their classes at home, and they receive offers to attend institutions around the world. They choose to come to the United States because they have determined an institution is the best option for them to pursue their chosen field of study. While here, they excel in their classes, and they provide new perspectives and experiences to their classmates and the broader university community.</p> <p>If we want to ensure the students fulfill the "specific purpose" they receive their visa (obtaining an education at a U.S. institution), we must ensure our laws and regulations are structured and implemented in a fair and transparent manner. We must work to limit uncertainty so that students can focus on learning instead of tracking constantly changing regulations. This new policy has the opposite result.</p> <p>Recommendations</p> <p>I urge you to take these concerns into consideration and rather than making the proposed changes,</p>	

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	<p>consider the following recommendations suggested by NAFSA (Association of International Educators):</p> <ul style="list-style-type: none"> · Leave in place the current policy, which has served for over 20 years. Neither DHS nor legacy INS ever published regulations to implement this important area of law. If the agency wishes to implement such a drastic change to longstanding common interpretation of the law, it must be done through the notice and comment process. · Do not implement any policy change until implementation has been fully coordinated with the Department of State and other DHS units such as CBP and SEVP. · Exclude from the unlawful presence count any status violations that occurred under color of law, to avoid “gotcha” scenarios, where the student reasonably relied on the authorizations granted. For example, curricular practical training authorized in SEVIS that DHS later determines may have been improperly given, should not start the unlawful presence “clock” until DHS or an immigration judge makes a formal status determination. · Apply the change of status/extension of stay tolling rules to reinstatement applications. · Expand the sections describing examples where F, M, and J nonimmigrants “do not accrue unlawful presence in certain situations.” [draft Adjudicator’s Field Manual 40.9.2(b)(1)(E)(iii)]. 	
<p>Lisa Ann Erwin, PhD Vice Chancellor for Student Life and Dean of Students University of Minnesota Duluth [REDACTED]@[REDACTED]</p>	<p>In the previous INS policies related to unlawful presence, F, J, and M nonimmigrants did not begin to accrue days of unlawful presence until the day after a DHS official or an immigration judge formally found that the nonimmigrant had committed a status violation. This formal finding also gave the nonimmigrant an opportunity to contest the matter if they thought it was warranted.</p> <p>With the proposed policy that would go into effect August 9, 2018, the F, J, and M nonimmigrant would begin to accrue days of unlawful presence “The day after the F, J, or M nonimmigrant no longer pursues the course of study or the authorized activity, or the day after he or she engages in an unauthorized activity”. This is highly concerning for several reasons.</p> <p>It is very easy for students to inadvertently make a small mistake that can cause them to violate their status. Examples include a student taking too many classes online instead of in person; dropping a class that causes them to fall below full-time enrollment; or working at an OPT job they believe directly relates to their major, but they later find that a DHS officer disagrees. Violations such as these may have occurred many years ago, but the student is unaware that a violation has taken place. At the point that a student has an official tell them that they find they have violated their status and have been accruing unlawful presence this whole time, they and their dependents may already be subject to the 3-</p>	

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	<p>year or 10-year bars.</p> <p>Additionally, this policy could potentially create severe consequences for students due to long case adjudication wait times. If an F-1 student violates their status and files a non-frivolous reinstatement petition within the 5 month period allowed in 8 CFR 214.2(f)(16), by the time they receive a decision on their case they could be subject to a 3-year or 10-year bar if the case is denied because reinstatement applications are taking 5-12 months to process currently. Long adjudication timelines and the severe consequences for students and their dependents need to be taken into consideration. It makes more sense that the unlawful presence does not begin to accrue until the nonimmigrant has been formally found to have violated their status, as with an official letter denying their application, etc.</p> <p>Long processing times are also concerning because the proposed policy states that “while the F-1 nonimmigrant is in a cap gap period under 8 CFR 214.2(f)(5)(vi), that is, during an automatic extension of an F-1 nonimmigrant’s D/S and employment authorization as provided under 8 CFR 214.2(f)(5)(vi) for a beneficiary of an H-1b petition and request for a change of status that has been timely filed and states that the employment start date for the F-1 nonimmigrant is October 1 of the following fiscal year”. Last year there were quite a lot of H-1b cap subject applications that were timely filed and were still processing after October 1 due to the high volume of applications, processing times, requests for evidence, etc. Similar to the concern noted above, situations like this must be addressed.</p> <p>It is extremely important that with the multiple government agencies involved, that the student, exchange visitor, or dependent have the opportunity to officially contest any supposed violations of status that are on their record.</p> <p>Lastly, it is critical to remember that F, J, and M nonimmigrants face intense visa screening and vetting prior to their arrival in the U.S. Harsh punishments for minor, inadvertent infractions committed by persons who have already been thoroughly vetted by the government seem unnecessarily punitive. International students not only contribute a great deal to the U.S. economy but also a great deal in non-monetary terms by enriching the classroom experience and helping the U.S. lead the world in innovation. NAFSA: Association of International Educators cites that in 2016-17 international students contributed almost \$37 billion to the U.S. economy and supported 450,000 U.S. jobs. Chellaraj, Maskus, and Aaditya (2008) found that for a 10% increase in international graduate students, that U.S.</p>	

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	<p>patent applications increase by 4.5%. The National Foundation for American Policy found that almost 23% of the founders of U.S. billion-dollar start-up companies first came to the U.S. as international students.</p> <p>I hope you will thoroughly address these concerns before moving forward with any new policy that will significantly change how unlawful presence is understood and implemented.</p>	
<p>Kent Dalrymple [REDACTED]@[REDACTED]</p>	<p>I'm Kent Dalrymple a local of Minneapolis, born and raised in Michigan.</p> <p>My thoughts below are regarding</p> <p>USCIS Changing Policy on Accrued Unlawful Presence by Nonimmigrant Students and Exchange Visitors</p> <p>Over the past few years I've befriended several students from South Korea and Malaysia.</p> <p>I write to you today as I'm concerned over the recent ruling on Foreign students ability to work in the US.</p> <p>I see that with the changes in laws many students here at the University of Minnesota are now suspect to fall below the minimum required credits to be considered full time students. Once this takes place a good portion of our foreign student body will be at risk for a ban spanning three to ten years upon leaving this country.</p> <p>These rulings are not just and hinder our community as a whole.</p> <p>Our foreign student body has come and added so much value to our great city and amazing University. These students went on to speak publicly before Congress. They have played a critical role in UMN's program's which provides sexual health awareness for all students.</p> <p>These are just a few of the many things our foreign students bring with them and yet we are now making it harder than ever for them to continue on in the US after graduation.</p> <p>Finding a job after graduation is a challenge!</p>	

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	<p>We need to lower the barrier so more of these educated minds stick around and use what they have learned to better our community.</p> <p>Our school has been enriched by these students and it is truly a disservice to higher education to have laws in place that treat these individuals as foreigners before treating them as students at our great University.</p> <p>To stay competitive with our ever changing world we need the minds and ideas that come across the entire globe.</p> <p>Our foreign students need an equal playing field so they can go forward and enrich the rest of country.</p> <p>I encourage those in a power to rethink their decisions.</p>	
Public Engagement Feedback publicengagementfeedback@uscis.dhs.gov	I am writing in response to the USCIS policy memo of May 10, 2018, "Accrual of Unlawful Presence and F, J, and M Nonimmigrants." I believe this draft policy places an unfair burden on international students, because it eliminates the distinction between violating immigration status and being unlawfully present in the US. Under current policy, an international student is clearly notified when their unlawful presence begins. Under the new policy, however, an international student could be unlawfully present without even knowing it. I recommend leaving the currently policy in place instead of implementing the policy described in this memo.	
Valerie Kinloch, Ph.D. Renée and Richard Goldman Dean of the School of Education University of Pittsburgh [REDACTED] Pittsburgh PA [REDACTED] [REDACTED]@[REDACTED]	<p>This public comment is regarding the new policy memorandum that proposes to change the way international students and exchange visitors on F, J and M visas, and their dependents would be found to have accrued unlawful presence, beginning August 9.</p> <p>Current policy stipulates that students do not accrue "unlawful presence" until <i>after</i> they are found guilty of violating the terms of their visa by a judge or formal investigation. If implemented, then the recommendations of Memo 602-1060 would allow unlawful presence to accumulate from the moment of the alleged violation, backdating the accrual by an amount of time that compounds the severity of the offense. Their language states:</p> <p><i>"The day after the F, J, or M nonimmigrant no longer pursues the course of study or the authorized activity, or the day after he or she engages in an unauthorized."</i></p> <p>This means that if a student unknowingly violates her/his visa, their unlawful presence clock will start</p>	

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	<p>immediately. This has several de facto consequences:</p> <ol style="list-style-type: none"> 1. This strips away the authority of a judge to decide if students have fallen out of status as opposed to processing errors and/or conducting follow-through on SEVIS by schools. 2. This strips away any chance for students and/or advisors to challenge the action. 3. This policy would de facto criminalize international students as soon as they violate their visa status. 4. The policy memo threatens to blur the distinction between violation of status and unlawful presence for F, J and M nonimmigrants. <p>Currently, the University of Pittsburgh has over 3,000 international students from over 100 different countries. Of those, approximately 65% are in graduate programs across all schools in the University. The School of Education enrolls approximately 122 international students across its different programs, and our students would be impacted by this policy.</p> <p>Additionally, this policy will not only impact our current international student population, but it will also affect the University's recruitment efforts, as it threatens the foundation of the current strategic plan and direction of the University and its School. In fact, it undermines the inclusive community and climate of the University, which is to promote top quality research, scholarship, teaching, and engagement.</p> <p>These recommendations are not only a threat to students, but also a threat to public higher education. Singling-out international students in this way undermines the educational mission and function of this great university. The recommendations outlined in Memo 602-1060 have the potential to affect the quality of work accomplished by our scholarly community and thwart our potential to transform education locally, nationally, and globally. The recommendations of Memo 602-1060 criminalize international scholars who contribute to the central function of public research universities. These recommendations place our students in jeopardy by codifying racism and xenophobia.</p>	
C. Jane Bjerklie-Barry, Director and Coordinator PDSO/RO Global Engagement Office [REDACTED]	I am writing in regard to the recommendations made in "Policy Memoranda: Accrual of Unlawful Presence and F, J, and M Nonimmigrants (PM-602-1060)." These proposals represent a radical change in USCIS's interpretation and application of the regulations related to the accrual of unlawful presence by those in student (F nonimmigrant), exchange visitor (J nonimmigrant), or vocational student (M nonimmigrant) status and their dependents while in the United States.	

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T: [REDACTED]	<p>I work at Plymouth State University, part of the University System of New Hampshire, and we have international students from more than 30 nations and faculty from across the globe. The international students, researchers, staff and faculty on our campuses bring unique experiences and perspectives to our classrooms, important ideas for discovery and innovation to our research labs, and exciting leadership to our campus community.</p> <p>As a PDSO (Principal Designated School Official)/RO (Responsible Officer), I was alarmed to read these proposed changes. A great deal of the daily work of my staff consists of the advising international students and scholars on how to maintain their visa status (and that of their dependents). This is something that the vast majority of international students deeply and sincerely want to do, and this means they need to remain aware of visa regulations while also balancing the demands all students experience along with their institution's requirements.</p> <p>There have been significant discussions amongst PDSOs, DSOs, and ROs since this memorandum was released regarding how we will assist F/J/M visa holders in understanding these new policies without inadvertently engaging in the unauthorized practice of law. While changes in regulations are to be expected, these proposed changes are especially problematic because they are a departure from the long-standing, common sense interpretation of visa regulations that has been in place for over 20 years, and it creates a system where F/J/M visa holders may be found to have violated their visa status years after the violation supposedly occurred—something that is especially troubling since this memorandum attaches the possibility that this violation could result in individuals being barred from entering the U.S. for three years, ten years, or permanently.</p> <p>Although the announcement regarding these changes comes with sufficient notice for individuals who are currently out of status to take steps to remedy their visa status before they begin accruing unlawful presence, this new interpretation will cause a great deal of uncertainty for F/J/M visa holders moving forward. Here are some specific examples of some problems DSOs/AROs foresee with the implementation of this memoranda:</p> <ol style="list-style-type: none"> 1. Recent SEVP Portal Release: SEVP recently implemented a Portal through which F-1 students on post-completion optional practical training (OPT) or STEM OPT are allowed to report changes to their personal and/or employment information, but there have been issues with the system. Students are required to report these changes with ten days, but periodic problems with SEVIS and the Portal have resulted in incomplete information being available to 	

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	<p>students and instances when students have not been able to access the Portal. Additionally, some students have been confused about what information to enter and how to correctly enter it. All of this has resulted in incomplete and inaccurate data being reported to SEVIS through the Portal despite the best efforts of F-1 visa holders to report their information. Therefore, if USCIS relies on information from SEVIS (something the Policy memo mentions as a likely source of information for making decisions about violations of status), it is likely that there will be students judged to have violated their status based on this bad data.</p> <p>While DSOs/AROs and others have been, historically, been able to help students resolve these data issues, the new interpretation of the regulations could mean that these student could be judged to have violated their status and could be be accruing unlawful presence without realizing it.</p> <p>2. Changes to Regulations Causing Previously Approved Actions to Become Violations: The student and scholar visa system (SEVIS) is set up so that school officials bear a great deal of responsibility for assisting F/J/M visa holders to maintain their status. As DSOs/AROs, we do our best communicate with our students when there are changes to visa regulations and regulatory interpretations. This is not an easy task—especially when changes to regulations or regulatory interpretations require that we tell students something that is the reverse of what we previously correctly advised them.</p> <p>In instances like the recent announcement restricting 3rd party employment for students on STEM OPT, it is very possible students will believe that they have done everything necessary to comply with the rules, only to apply to renew a visa or to change visa status in the future and be told that their actions (permissible when they started, but now not allowed due to changes in regulatory interpretations) were a violation of their status, and they have since accrued unlawful presence, barring them from changing visa status or re-entering the U.S.</p> <p>These are only two recent examples of actions that could result in international students accruing unlawful presence despite their attempts to follow the rules. We foresee many additional problems and unintended consequences that will result from such a large and dramatic shift in regulatory interpretation.</p> <p>In conclusion</p> <p>The USCIS press release for this memorandum quotes USCIS Director L. Francis Cissna as saying,</p>	

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	<p>“USCIS is dedicated to our mission of ensuring the integrity of the immigration system. F, J, and M nonimmigrants are admitted to the United States for a specific purpose, and when that purpose has ended, we expect them to depart, or to obtain another, lawful immigration status.” This change, however, will not contribute meaningfully to that objective. Instead, it will likely result in confusion that will mean well-meaning international students and exchange visitors could be found to have accrued unlawful presence due to innocent mistakes or misunderstandings of changing regulations. Due to the strict bars that will be applied to these individuals due to these changes, these misunderstandings could have severe consequences.</p> <p>We are at a point in time where our international students can choose to study anywhere in the world. Many international students who enroll at U.S. institutions are the best of their classes at home, and they receive offers to attend institutions around the world. They choose to come to the United States because they have determined an institution is the best option for them to pursue their chosen field of study. While here, they excel in their classes, and they provide new perspectives and experiences to their classmates and the broader university community. Recent data “...finds that the 96,472 international students studying at U.S. community colleges contributed \$2.4 billion and supported more than 14,000 jobs to the U.S. economy during the 2016-2017 academic year.” [NAFSA, 2018 www.nafsa.org] These are powerful numbers that contribute greatly to America’s strong economy as well as the vibrant fabric of our society.</p> <p>If we want to ensure the students fulfill the “specific purpose” they receive their visa (obtaining an education at a U.S. institution), we must ensure our laws and regulations are structured and implemented in a fair and transparent manner. We must work to limit uncertainty so that students can focus on learning instead of tracking constantly changing regulations. This new policy has the opposite result.</p> <p>Recommendations</p> <p>I urge you to take these concerns into consideration and rather than making the proposed changes, consider the following recommendations suggested by NAFSA (Association of International Educators):</p> <ul style="list-style-type: none"> · Leave in place the current policy, which has served for over 20 years. Neither DHS nor legacy INS ever published regulations to implement this important area of law. If the agency wishes to implement such a drastic change to longstanding common interpretation of the law, it must be done through the notice and comment process. 	

Accrual of Unlawful Presence and F, J, and M Nonimmigrants

Stakeholder Comments Matrix

STAKEHOLDER/ ORGANIZATION	STAKEHOLDER COMMENTS	ORIGINATING OFFICE'S RESOLUTIONS
	<ul style="list-style-type: none"> · Do not implement any policy change until implementation has been fully coordinated with the Department of State and other DHS units such as CBP and SEVP. · Exclude from the unlawful presence count any status violations that occurred under color of law, to avoid "gotcha" scenarios, where the student reasonably relied on the authorizations granted. For example, curricular practical training authorized in SEVIS that DHS later determines may have been improperly given, should not start the unlawful presence "clock" until DHS or an immigration judge makes a formal status determination. · Apply the change of status/extension of stay tolling rules to reinstatement applications. · Expand the sections describing examples where F, M, and J nonimmigrants "do not accrue unlawful presence in certain situations." [draft Adjudicator's Field Manual 40.9.2(b)(1)(E)(iii)]. 	
Lori Friedman Director Office of International Students & Scholars [REDACTED]	Please see the attached comments from the University of St. Thomas regarding our concerns for the proposed policy memo: Accrual of Unlawful Presence and F, J, and M Nonimmigrants (PM-602-1060), Dated May 10, 2018	
Ivor M. Emmanuel [REDACTED]@[REDACTED]	<p>I write in response to the U.S. Citizenship and Immigration Services (USCIS) policy memorandum of May 10, 2018, "Accrual of Unlawful Presence and F, J, and M Nonimmigrants." The memo is a departure from more than 20 years of policy guidance. We respectfully request that this policy not be implemented and instead further study the issue and coordinate a better strategy by coordinating with other agencies.</p> <p>The proposed change is operationally complex and may lead to wrongly identifying some foreign students and exchange visitors as failing to maintain lawful status, thus unfairly subjecting them to the 3-year, 10-year, or permanent bars to re-entry to the United States. Given the huge financial investments made by international students they should be allowed to complete their studies at their chosen institution, without the stress or fear of being deported based on an oversight of which they may not be aware. This memo eliminates the long-held distinction between violating immigration status and being unlawfully present in the United States. The concept of "unlawful presence" with various "clocks," "tolling" provisions, and "bars" has to this point been the purview of immigration law specialists.</p> <p>USCIS may achieve the goal of reducing the number of nonimmigrants who violate immigration status or stay beyond the legally allowable period through the implementation of various policies within the sub-agencies of the Department of Homeland Security (DHS) and in collaboration with other federal</p>	

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	<p>agencies. These policy changes must be implemented before announcing a policy change that will apply a disproportionate punishment of the 3-year, 10-year, and permanent bars of admissibility to international students and exchange visitors and their spouses.</p> <p>A failure to account for inconsistency among immigration documents, electronic records, and actions and events in the real world could lead to an adverse determination on status or benefit eligibility. Whether the data in documents and electronic records is being interpreted correctly, taking into account all applicable law and policy, is also a primary concern. Immigration law is complicated, and both compliance and enforcement is a very technical matter that requires training and expertise. Because of this complexity, an alien might not even know he or she is "out of status" until informed by the government.</p> <p>Because the INA 212(a)(9)(B) penalties are so severe, we must also weigh the fairness of the policies enforcing that law. Long USCIS adjudication times, for example, may lead to someone becoming subject to the unlawful presence penalties in any case that is ultimately denied. In the proposed policy, virtually all students who submit reinstatement applications and who are denied would find themselves subject to at least the 3-year bar, merely because USCIS takes so long to adjudicate applications for reinstatement. For example, a student who simply forgets to extend their I-20 and misses the extension deadline by more than 15 days (PDSO extension window) and has only 1 semester left. These students can either travel and lose OPT or file for reinstatement. These reinstatements take up to 6 months or more. The risk for reinstatement would be so great that the student would have to make a terrible choice- to disrupt studies and travel at a critical completion period and lose post-completion training benefits OR apply for a reinstatement that might result in their facing 3-10 year bars if denied. In addition, a student or exchange visitor might not even know that he or she was in violation of status until DHS makes a formal determination of that. If the unlawful presence "clock" is seen to start at some distant time in the past in such cases, any window for departing the country will have passed. In addition, there is no indication that USCIS has adequately coordinated implementation of this extreme policy shift with other government stakeholders, including the Department of State (including the Visa Office and the Bureau of Education and Cultural Affairs' Exchange Visitor Program), and other divisions of DHS, such as Immigration and Customs Enforcement (ICE), the Student and Exchange Visitor Program (SEVP), and Customs and Border Protection.</p> <p>Recommendations in lieu of implementing the policy described in the memo:</p> <ul style="list-style-type: none"> · Leave in place the current policy, which has served for over 20 years. Neither DHS nor legacy INS ever published regulations to implement this important area of law. If the agency wishes to implement such a drastic change to longstanding common interpretation of the law, it must be done through the notice and comment process. 	

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Theresa GanglGhassemlouei Assistant Director for Advising International Student & Scholar Services (ISSS) [REDACTED] Phone: [REDACTED] Fax: [REDACTED]	Please see the <u>attached</u> .	
Jason Saavedra [REDACTED]@[REDACTED]	<p>It is absolutely necessary that Mr. Cissna and USCIS as a whole look into the problems associated with adjustments of status. While it has its purposes, it also undeniably operates as a perpetual amnesty. As Jessica Vaughan wrote in her article (https://cis.org/Shortcuts-Immigration-Temporary-Visa-Program-Broken), such nonimmigrant visas operate in part as a “gray-market alternative” to the immigrant visa (IV) program. Adjustments of status are undeniably facilitating and encouraging this gray-market alternative to our immigration system.</p> <p>If attempts to severely restrict adjustments of status are not considered and implemented, the line between IV and NIV will continue to blur. As USCIS statistics have shown, over 90% of adjustment of status applications have been approved:</p> <p>https://www.uscis.gov/tools/reports-studies/immigration-forms-data/data-set-form-i-485-application-adjustment-status</p> <p>Bottom line: this has and will continue to undermine our immigration system AND ICE's attempts to successfully deport illegals (especially overstays).</p> <p>To truly target visa overstays and strongly discourage people from overstaying in the future, the</p>	

Accrual of Unlawful Presence and F, J, and M Nonimmigrants

Stakeholder Comments Matrix

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	Director (USCIS) must immediately look into adjustments of status and proceed accordingly from there with our Attorney General.	
Robert S. FitzSimmonds Graduate Student in Library Science [REDACTED]@[REDACTED]	I am writing in support of a proposed change to the guidelines for accrual of time under the unlawful presence provisions of federal policy. While the student congress at the University of Kentucky has sent a knee jerk reaction out to all students, labeling this a discriminatory change, I think that a more measured and helpful approach is to view this as an imposition of common sense, and an adherence to the rule of law. Please proceed with tightening the regulations on people illegally in this country.	
Gemma Elizabeth Cooper-Novack [REDACTED]@[REDACTED]	The new policy as proposed in this memo fundamentally precludes graduate students on F visas from renewing their studies, thus contributing to brain drain in American education systems and creating next to no opportunities for cross-cultural engagement.	
Rebecca Curran International Student Advisor, DSO Cultural Ambassador Program Co-Sponsor YSP Chair Wichita State University Office of International Education Garvey International Center [REDACTED] Wichita, KS [REDACTED] Office: [REDACTED] Fax: [REDACTED] E-mail: [REDACTED]@[REDACTED]	<p>I am writing in regard to the recommendations made in "Policy Memoranda: Accrual of Unlawful Presence and F, J, and M Nonimmigrants (PM-602-1060)." These proposals represent a radical change in USCIS's interpretation and application of the regulations related to the accrual of unlawful presence by those in student (F nonimmigrant), exchange visitor (J nonimmigrant), or vocational student (M nonimmigrant) status and their dependents while in the United States.</p> <p>I work at Wichita State University, and we have international students from more than 100 nations and faculty from across the globe. The international students, researchers, staff and faculty on our campuses bring unique experiences and perspectives to our classrooms, important ideas for discovery and innovation to our research labs, and exciting leadership to our campus community.</p> <p>As a DSO (Designated School Official), I was alarmed to read these proposed changes. A great deal of my daily work consists of advising international students and scholars on how to maintain their visa status (and that of their dependents). This is something that the vast majority of international students deeply and sincerely want to do, and this means they need to remain aware of visa regulations while also balancing the demands all students experience along with their institution's requirements.</p> <p>There have been significant discussions amongst DSOs and AROs since this memorandum was released regarding how we will assist F/J/M visa holders in understanding these new policies without inadvertently engaging in the unauthorized practice of law. While changes in regulations are to be expected, these proposed changes are especially problematic because they are a departure from the long-standing, common sense interpretation of visa regulations that has been in place for over 20 years, and it creates a system where F/J/M visa holders may be found to have violated their visa status years after the violation supposedly occurred—something that is especially troubling since this memorandum</p>	

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	<p>attaches the possibility that this violation could result in individuals being barred from entering the U.S. for three years, ten years, or permanently.</p> <p>Although the announcement regarding these changes comes with sufficient notice for individuals who are currently out of status to take steps to remedy their visa status before they begin accruing unlawful presence, this new interpretation will cause a great deal of uncertainty for F/J/M visa holders moving forward. Here are some specific examples of some problems DSOs/AROs foresee with the implementation of this memoranda:</p> <ol style="list-style-type: none"> 1. Recent SEVP Portal Release: SEVP recently implemented a Portal through which F-1 students on post-completion optional practical training (OPT) or STEM OPT are allowed to report changes to their personal and/or employment information, but there have been issues with the system. Students are required to report these changes within ten days, but periodic problems with SEVIS and the Portal have resulted in incomplete information being available to students and instances when students have not been able to access the Portal. Additionally, some students have been confused about what information to enter and how to correctly enter it. All of this has resulted in incomplete and inaccurate data being reported to SEVIS through the Portal despite the best efforts of F-1 visa holders to report their information. Therefore, if USCIS relies on information from SEVIS (something the Policy memo mentions as a likely source of information for making decisions about violations of status), it is likely that there will be students judged to have violated their status based on this bad data. <p>While DSOs/AROs and others have been, historically, been able to help students resolve these data issues, the new interpretation of the regulations could mean that these student could be judged to have violated their status and could be accruing unlawful presence without realizing it.</p> <ol style="list-style-type: none"> 2. Changes to Regulations Causing Previously Approved Actions to Become Violations: The student and scholar visa system (SEVIS) is set up so that school officials bear a great deal of responsibility for assisting F/J/M visa holders to maintain their status. As DSOs/AROs, we do our best communicate with our students when there are changes to visa regulations and regulatory interpretations. This is not an easy task—especially when changes to regulations or regulatory interpretations require that we tell students something that is the reverse of what we previously correctly advised them. <p>In instances like the recent announcement restricting 3rd party employment for students on</p>	

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	<p>STEM OPT, it is very possible students will believe that they have done everything necessary to comply with the rules, only to apply to renew a visa or to change visa status in the future and be told that their actions (permissible when they started, but now not allowed due to changes in regulatory interpretations) were a violation of their status, and they have since accrued unlawful presence, barring them from changing visa status or re-entering the U.S.</p> <p>These are only two recent examples of actions that could result in international students accruing unlawful presence despite their attempts to follow the rules. We foresee many additional problems and unintended consequences that will result from such a large and dramatic shift in regulatory interpretation.</p> <p>In conclusion</p> <p>The USCIS press release for this memorandum quotes USCIS Director L. Francis Cissna as saying, "USCIS is dedicated to our mission of ensuring the integrity of the immigration system. F, J, and M nonimmigrants are admitted to the United States for a specific purpose, and when that purpose has ended, we expect them to depart, or to obtain another, lawful immigration status." This change, however, will not contribute meaningfully to that objective. Instead, it will likely result in confusion that will mean well-meaning international students and exchange visitors could be found to have accrued unlawful presence due to innocent mistakes or misunderstandings of changing regulations. Due to the strict bars that will be applied to these individuals due to these changes, these misunderstandings could have severe consequences.</p> <p>We are at a point in time where our international students can choose to study anywhere in the world. Many international students who enroll at U.S. institutions are the best of their classes at home, and they receive offers to attend institutions around the world. They choose to come to the United States because they have determined an institution is the best option for them to pursue their chosen field of study. While here, they excel in their classes, and they provide new perspectives and experiences to their classmates and the broader university community.</p> <p>If we want to ensure the students fulfill the "specific purpose" they receive their visa (obtaining an education at a U.S. institution), we must ensure our laws and regulations are structured and implemented in a fair and transparent manner. We must work to limit uncertainty so that students can focus on learning instead of tracking constantly changing regulations. This new policy has the opposite</p>	

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	<p>result.</p> <p>Recommendations</p> <p>I urge you to take these concerns into consideration and rather than making the proposed changes, consider the following recommendations suggested by NAFSA (Association of International Educators):</p> <ul style="list-style-type: none"> · Leave in place the current policy, which has served for over 20 years. Neither DHS nor legacy INS ever published regulations to implement this important area of law. If the agency wishes to implement such a drastic change to longstanding common interpretation of the law, it must be done through the notice and comment process. · Do not implement any policy change until implementation has been fully coordinated with the Department of State and other DHS units such as CBP and SEVP. · Exclude from the unlawful presence count any status violations that occurred under color of law, to avoid “gotcha” scenarios, where the student reasonably relied on the authorizations granted. For example, curricular practical training authorized in SEVIS that DHS later determines may have been improperly given, should not start the unlawful presence “clock” until DHS or an immigration judge makes a formal status determination. · Apply the change of status/extension of stay tolling rules to reinstatement applications. · Expand the sections describing examples where F, M, and J nonimmigrants “do not accrue unlawful presence in certain situations.” [draft Adjudicator’s Field Manual 40.9.2(b)(1)(E)(iii)]. 	
Ankit Patel [REDACTED]@[REDACTED]	<p>I would like to submit the following comments in response to the USCIS Proposed Policy Memo “Accrual of Unlawful Presence and F, J, and M Nonimmigrants” (PM-602-1060), posted on May 11, 2018.</p> <p>I am an F-1 international student who has recently graduated from Temple University and am working based on Optional Practical Training (OPT). My employer has recently petitioned for my H-1B work visa during the cap-subject application period in April.</p> <p>My concern with the proposed memorandum is that its new calculation of accrual of unlawful presence may jeopardize my ability to obtain a nonimmigrant visa from a consulate. By essentially equating unlawful presence with failure to maintain proper status, the policy memo puts an undue burden on F-1 students and penalizes them retroactively. The new calculation would render F-1 students unlawfully present dating back to the day after a failure to maintain F-1 status began, rather than from the day of an adverse decision by DHS or an immigration judge.</p> <p>This is an undue burden and disproportionate penalty on us F-1 students because the policies for</p>	

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	<p>maintaining proper F-1 status have not always been made uniformly clear to us, or even to our DSOs. As an F-1 student, I rely heavily on my school's DSO in order to maintain valid status, as he or she issues my I-20s, endorses the I-20s for work authorization, and updates my records in the SEVIS system. F-1 students may have engaged in certain employment activities with the full endorsement of their school's DSO, and issuance of an Employment Authorization Document by DHS, only to discover later that the initial grant of work authorization was improper.</p> <p>These inconsistencies are sometimes due to DSO error but are also due to DHS interpretations that may change without warning and get applied retroactively, to our detriment. Updates to USCIS interpretation of employer-employee relationships, for example, may retroactively invalidate an arrangement that I worked under during my OPT training period. The proposed policy memo would result in accrual of unlawful presence retroactively, during a period of time when USCIS policy was different or unclear.</p> <p>Furthermore, the extensive processing times for H-1B change of status petitions, combined with the suspension of premium processing for cap-subject H-1B applications, puts students like me at risk of having accrued unlawful presence for more than six months by the time USCIS has adjudicated my H-1B application and made a determination on whether I have maintained proper status. The extensive service center backlogs, suspension of premium processing, and sudden change in unlawful presence interpretation are all beyond the control of F-1 students.</p> <p>The accrual of unlawful presence calculation is currently linked to an adverse determination by DHS or an immigration judge (or by the expiration of an I-94) because such a determination actively puts the student on notice that he or she was no longer authorized to stay and/or work in the U.S., and should depart immediately. The calculation under this proposed memo will put students like me in a position to have possibly accrued several months of unlawful presence unknowingly. It is further exacerbated by the fact that their accrual of unlawful presence may have been endorsed by my school's DSO, the main immigration-related official that I have any contact with and on whom I rely. The application of the proposed memo will unfairly penalize students like me who have acted in good faith, who timely applied for work authorization, and acted according to the policies in effect at the time. It will affect our ability to apply for any other nonimmigrant visa in the U.S., as well as prevent us from applying for a visa at a consulate abroad due to the inadmissibility bar.</p> <p>It is not my intention to overstay my visa or to be unlawfully present in the U.S. I have come to study in the U.S. in order to gain a higher education in America's universities, and to supplement my education through hands-on work experience. My intention is to do so by complying with the relevant immigration regulations and policies. However, when those policies are not always clear, and my studies or work experience are being endorsed by the school's DSO, I feel I should not be penalized retroactively when I have acted in good faith and am informed later that there was a problem with my</p>	

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	<p>maintenance of status. I would advocate for the continuation of the current calculation of accrual of unlawful presence for F-1 individuals, which would allow for clear notice to the F-1 student concerning a failure to maintain proper status, a clear start date for the accrual of unlawful presence, and application of a re-entry bar only after remaining in the U.S. for a significant period beyond that notice. This calculation is equitable and avoids disproportionately penalizing students who have acted in good faith, and would allow us an opportunity to remedy our visa status once we become aware of the problem by being able to depart the U.S. as soon as we become aware that unlawful presence has begun to accrue.</p> <p>I urge against the implementation of this proposed policy memo. Thank you for your consideration, time, and support in this matter.</p>	
<p>Amy Weber International Student and Scholar Officer New Mexico State Representative, NAFSA Central New Mexico Community College Albuquerque, NM</p>	<p>I am writing in regard to the recommendations made in "Policy Memoranda: Accrual of Unlawful Presence and F, J, and M Nonimmigrants (PM-602-1060)." These proposals represent a radical change in USCIS's interpretation and application of the regulations related to the accrual of unlawful presence by those in student (F nonimmigrant), exchange visitor (J nonimmigrant), or vocational student (M nonimmigrant) status and their dependents while in the United States.</p> <p>The international students, staff, and faculty on our campuses bring unique experiences and perspectives to our classrooms, important ideas for discovery and innovation, and exciting leadership to our campus community.</p> <p>As a DSO (Designated School Official), I was alarmed to read these proposed changes. A great deal of my daily work consists of advising international students on how to maintain their visa status (and that of their dependents). This is something that the vast majority of international students deeply and sincerely want to do, and this means they need to remain aware of visa regulations while also balancing the demands all students experience along with their institution's requirements.</p> <p>There have been significant discussions amongst DSOs since this memorandum was released regarding how we will assist F/J/M visa holders in understanding these new policies without inadvertently engaging in the unauthorized practice of law. While changes in regulations are to be expected, these proposed changes are especially problematic because they are a departure from the long-standing, common sense interpretation of visa regulations that has been in place for over 20 years, and it creates a system where F/J/M visa holders may be found to have violated their visa status years after the violation supposedly occurred—something that is especially troubling since this memorandum attaches the possibility that this violation could result in individuals being barred from entering the U.S. for three years, ten years, or permanently.</p>	

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	<p>This new interpretation will cause a great deal of uncertainty for F/J/M visa holders moving forward. Here are some specific examples of some problems DSOs foresee with the implementation of this memoranda:</p> <ol style="list-style-type: none"> 1. Recent SEVP Portal Release: SEVP recently implemented a Portal through which F-1 students on post-completion optional practical training (OPT) or STEM OPT are allowed to report changes to their personal and/or employment information, but there have been issues with the system. Students are required to report these changes with ten days, but periodic problems with SEVIS and the Portal have resulted in incomplete information being available to students and instances when students have not been able to access the Portal. Additionally, some students have been confused about what information to enter and how to correctly enter it. All of this has resulted in incomplete and inaccurate data being reported to SEVIS through the Portal despite the best efforts of F-1 visa holders to report their information. Therefore, if USCIS relies on information from SEVIS (something the Policy memo mentions as a likely source of information for making decisions about violations of status), it is likely that there will be students judged to have violated their status based on this bad data. <p>While DSOs and others have historically been able to help students resolve these data issues, the new interpretation of the regulations could mean that these student could be judged to have violated their status and could be accruing unlawful presence without realizing it.</p> <ol style="list-style-type: none"> 2. Changes to Regulations Causing Previously Approved Actions to Become Violations: The student and scholar visa system (SEVIS) is set up so that school officials bear a great deal of responsibility for assisting F/J/M visa holders to maintain their status. As DSOs, we do our best communicate with our students when there are changes to visa regulations and regulatory interpretations. This is not an easy task—especially when changes to regulations or regulatory interpretations require that we tell students something that is the reverse of what we previously correctly advised them. <p>In instances like the recent announcement restricting 3rd party employment for students on STEM OPT, it is very possible students will believe that they have done everything necessary to comply with the rules, only to apply to renew a visa or to change visa status in the future and be told that their actions (permissible when they started, but now not allowed due to changes in regulatory interpretations) were a violation of their status, and they have since accrued unlawful presence, barring them from changing visa status or re-entering the U.S.</p>	


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	<p>These are only two recent examples of actions that could result in international students accruing unlawful presence despite their attempts to follow the rules. We foresee many additional problems and unintended consequences that will result from such a large and dramatic shift in regulatory interpretation.</p> <p>In conclusion</p> <p>The USCIS press release for this memorandum quotes USCIS Director L. Francis Cissna as saying, "USCIS is dedicated to our mission of ensuring the integrity of the immigration system. F, J, and M nonimmigrants are admitted to the United States for a specific purpose, and when that purpose has ended, we expect them to depart, or to obtain another, lawful immigration status." This change, however, will not contribute meaningfully to that objective. Instead, it will likely result in confusion that will mean well-meaning international students and exchange visitors could be found to have accrued unlawful presence due to innocent mistakes or misunderstandings of changing regulations. Due to the strict bars that will be applied to these individuals due to these changes, these misunderstandings could have severe consequences.</p> <p>We are at a point in time where our international students can choose to study anywhere in the world. Many international students who enroll at U.S. institutions are the best of their classes at home, and they receive offers to attend institutions around the world. They choose to come to the United States because they have determined an institution is the best option for them to pursue their chosen field of study. While here, they excel in their classes, and they provide new perspectives and experiences to their classmates and the broader university community.</p> <p>If we want to ensure the students fulfill the "specific purpose" they receive their visa (obtaining an education at a U.S. institution), we must ensure our laws and regulations are structured and implemented in a fair and transparent manner. We must work to limit uncertainty so that students can focus on learning instead of tracking constantly changing regulations. This new policy has the opposite result.</p> <p>Recommendations</p> <p>I urge you to take these concerns into consideration and rather than making the proposed changes,</p>	

Accrual of Unlawful Presence and F, J, and M Nonimmigrants

Stakeholder Comments Matrix

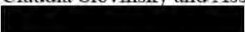
STAKEHOLDER/ ORGANIZATION	STAKEHOLDER COMMENTS	ORIGINATING OFFICE'S RESOLUTIONS
	<p>consider the following recommendations suggested by NAFSA (Association of International Educators):</p> <ul style="list-style-type: none"> • Leave in place the current policy, which has served for over 20 years. Neither DHS nor legacy INS ever published regulations to implement this important area of law. If the agency wishes to implement such a drastic change to longstanding common interpretation of the law, it must be done through the notice and comment process. • Do not implement any policy change until implementation has been fully coordinated with the Department of State and other DHS units such as CBP and SEVP. • Exclude from the unlawful presence count any status violations that occurred under color of law, to avoid “gotcha” scenarios, where the student reasonably relied on the authorizations granted. For example, curricular practical training authorized in SEVIS that DHS later determines may have been improperly given, should not start the unlawful presence “clock” until DHS or an immigration judge makes a formal status determination. • Apply the change of status/extension of stay tolling rules to reinstatement applications. • Expand the sections describing examples where F, M, and J nonimmigrants “do not accrue unlawful presence in certain situations.” [draft Adjudicator’s Field Manual 40.9.2(b)(1)(E)(iii)]. 	
<p>Michelle Massey Assistant Director of International Student and Scholar Services Office of International Education Services UMBC - The University of Maryland, Baltimore County [REDACTED]; Admin 227A</p>	<p>Thank you for the opportunity to comment on PM-602-1060: Unlawful Presence and F, J and M Nonimmigrants.</p> <p>The background section of the memo explains that this change intends to further minimize the number of F, J and M visa holders that overstay. However, I assert that the changes will not be effective in achieving this goal.</p> <p>I work with predominantly F-1 students, as well as some J-1 scholars, and have for 12 years. I am also a Regulatory Ombudsmen with NAFSA, the Association of International Educators. however, I write my comments as an individual practitioner in the field, and not as a representative for my University or for NAFSA.</p> <p>I ask USCIS to consider that, with the goal of reducing overstays, the memo is not clear in how students and scholars in these visa categories will be considered to have formally lost their status and be expected to leave the US.</p> <p>As summarized in the background, the current policy guidance is that unlawful presence begins when a</p>	

STAKEHOLDER/ ORGANIZATION	STAKEHOLDER COMMENTS	ORIGINATING OFFICE'S RESOLUTIONS
	<p>student is formally deemed out of status by USCIS or an immigration judge. Before this time, students have the option to try to regain their status, such as by means of reinstatement or correction requests within the SEVIS system, by SEVP. These processes are often long and slow, and a student under this new rule can potentially be accruing unlawful presence while awaiting a correction or decision that may allow them to regain their status. This does not work towards minimizing overstay, as students may be able to regain their status, or may not have lost it in the first place but appear to have lost it do to a technical error, depending on their situation. It also is unfair to the student, who has either made no mistake or is in the process of seeking reinstatement, as is allowable by USCIS via 8 CFR 214.2(f)(16).</p> <p>A further concern is that a student can be found to be retroactively out of status and considered to have been accruing unlawful presence for the duration of time since that retroactive finding that the student should be out of status. This case does not present the student with a fair opportunity to leave the US after the accused violation without accruing unlawful presence, or the time to petition to have this decision reconsidered. This certainly does not contribute to minimizing overstay, but rather increase overstay, as students would find themselves in the position of having overstayed significantly without any alternative, given a retroactive loss of status.</p> <p>I appreciate the information in the "Policy" section, pages 4-5, that explains that USCIS officers determining unlawful presence should factor in considerations such as RFE's and information available in the immigration record. However, I don't think the policy is clear on cases such as pending Reinstatement, where a student's immigration record appears to be out of status, but their pending reinstatement application allows them to remain legally in the US until a decision is made. Certain common cases like this should be clarified in the policy, if it will be specifically for F, J and M students. We need to know how to advise our students in these situations so that they can avoid overstaying as much as possible.</p> <p>I want to be clear that I appreciate the attempts to make sure students in these categories do not overstay or engage in unauthorized activity while in the US in these visa categories. Along with most who work in our field, I strive to make sure students understand and respect these rules, and want my students to have a good educational opportunity within the confines of immigration rules for their category and not jeopardize their good status. However, situations arise that are unavoidable, and students have the right to go through the available steps with USCIS to try to regain status, such as reinstatement. The policy needs to be clear that students with a pending application to review a decision, such as reinstatement, are not accruing unlawful presence until they receive a decision. I'm also very troubled by the idea that a student could have their status retroactively revoked and then the</p>	

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	<p>time since then would automatically be considered unlawful presence - I believe there should be clarity in the policy as to how a student can contest a decision such as this, perhaps through a process like reinstatement, before they begin accruing unlawful presence. This needs to be in place to address the complexity of the immigration regulations and be mindful of the role the student had in the offense - for example, if a DSO approves CPT work authorization for an F-1 student that is later deemed to be a violation of status, does the fault lie with the student or DSO? Would a student in this case lose status and have accrued unlawful presence since the time the CPT was approved?</p> <p>I appreciate your time and attention, and hope that these comments will provide some content to consider when refining or reconsidering this policy. With the stated goal of reducing overstay, our students need to know clearly what their status and options are, and this policy does not necessarily provide for this clarity as written. To best reach this goal, please make it very clear to students how unlawful presence can be accrued in cases where they are seeking to regain status or have a past offense that is being considered a violation retroactively.</p>	
Donna Anderson Director, International Programs University of Wisconsin-Platteville 	<p>I am writing in response to the U.S. Citizenship and Immigration Services (USCIS) policy memorandum of May 10, 2018, "Accrual of Unlawful Presence and F, J, and M Nonimmigrants."</p> <p>My greatest concern with this policy change is it would allow USCIS to apply unlawful presence to students or exchange visitors retroactively without students or exchange visitors having any advance notification they were in violation of their status. Students, exchange visitors and/or DSOs/AROs may have believed in good faith that the student or exchange visitor was maintaining legal status, only to later discover the student/exchange visitor unknowingly committed a status violation and may already be subject to a bar to re-entry.</p> <p>Not only is this policy change unfair and logistically very challenging to enforce, it is also contrary to our nation's best interests. When we create an unwelcoming atmosphere for international students and exchange visitors, and put in place policies that deter them from choosing our country as a place to engage in educational and cross-cultural exchange activities, we make our nation less safe and we deprive ourselves of valuable allies.</p> <p>Furthermore, the policy change does not address how unlawful presence will be applied to reinstatement applicants, DACA recipients with orders of removal, or students with DSO-authorized CPT that is later determined to be inappropriately authorized.</p> <p>Since the proposed change outlined in this memorandum has the potential to wrongly identify a large number of foreign students and exchange visitors as failing to maintain lawful status and to unfairly subject them to the 3-year, 10-year, or permanent bars to re-entry, I am requesting you please leave in place the current policy, which has been in place for over 20 years, and withdraw the memo and implement the changes outlined in the letter submitted to you by NAFSA: Association of International</p>	


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	<p>Educators on May 25, 2018:</p> <ul style="list-style-type: none"> Do not implement any policy change until implementation has been fully coordinated with the Department of State and other DHS units such as CBP and SEVP. Exclude from the unlawful presence count any status violations that occurred under color of law, to avoid “gotcha” scenarios, where the student reasonably relied on the authorizations granted. For example, curricular practical training authorized in SEVIS that DHS later determines may have been improperly given, should not start the unlawful presence “clock” until DHS or an immigration judge makes a formal status determination. Apply the change of status/extension of stay tolling rules to reinstatement applications. Expand the sections describing examples where F, M, and J nonimmigrants “do not accrue unlawful presence in certain situations.” [draft Adjudicator’s Field Manual 40.9.2(b)(1)(E)(iii)]. 	
<p>Michael P. Nowlan CLARK HILL PLC [REDACTED] Detroit, Michigan [REDACTED] (direct) [REDACTED] (fax) [REDACTED] (cell) [REDACTED]@[REDACTED]</p>	<p>I am writing to express my opposition and concerns regarding the new policy memorandum, “Accrual of Unlawful Presence and F, J, and M Nonimmigrants,” posted by U.S. Citizenship and Immigration Services (USCIS) on May 11, 2018.</p> <p>Briefly stated, the new memorandum will reverse more than 20 years of USCIS practice regarding the accrual of “unlawful presence,” a legal term defined under section 212(a)(9)(B)(ii) of the Immigration and Nationality Act (INA) by reference to an individual who “is present in the United States after expiration of the period of stay authorized by the Attorney General or is present in the United States without being admitted or paroled.” For nonimmigrant students and exchange visitors in the F, J, and M categories, legacy Immigration and Naturalization Service (INS) and USCIS have interpreted the statutory unlawful presence provisions to require notice to the individual of a status violation prior to the commencement of the unlawful presence clock. Such notice is provided in the context of the adjudication of a request for an immigration benefit by USCIS or a determination of a status violation by an immigration judge. The USCIS guidance articulating this position states, “It must be emphasized that the accrual of unlawful presence neither begins on the date that a status violation occurs, nor on the day on which removal proceedings are initiated.”^[1] This longstanding policy provides certainty in determining when unlawful presence begins to accrue, which the new policy does not.</p> <p>As described in the May 11, 2018 memorandum, USCIS will now deem unlawful presence to have started accruing as of the day after the date that a status violation occurs, thus removing the critical procedural safeguard of providing notice to affected individuals that may find themselves subject to the</p>	

^[1] See USCIS Memorandum, Consolidation of Guidance Concerning Unlawful Presence for Purposes of Sections 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I) of the Act,” (May 6, 2009), available at <http://www.aila.org/infonet/uscis-consolidation-guidance-unlawful-presence>.

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	<p>three- and ten-year bars to admissibility. This raises serious questions regarding fundamental fairness and due process and will have a significant negative impact on the student, vocational, and exchange visitor communities.</p> <p>In recognition of the fluidity of academic programs, F, M, and J nonimmigrants are not admitted to the U.S. until a date-certain. Instead, they are admitted for the "duration of their status," or "D/S," which means the student or exchange visitor can remain in the United States as long as they maintain their nonimmigrant status. This generally means the student must maintain a full course of study or remain in the exchange program, not engage in unauthorized employment or other unauthorized activities, and complete the academic or exchange program in a timely manner or obtain an extension. What the new memorandum fails to recognize is that the question as to whether an individual has violated their nonimmigrant status is complex and nuanced. Students and exchange visitors can accidentally and unknowingly violate their status by dropping slightly below a full course of study, or by engaging in innocent, but unauthorized activity. For example, F-1 students are permitted to engage in work at a "qualifying on-campus job" for up to 20 hours per week while school is in session. Therefore, an F-1 student who inadvertently exceeds the 20-hour limit by just a couple of hours has technically violated his or her student status. In addition, a Designated School Official may make a good faith error in advising a student by authorizing a reduced course load that should not have been approved, thereby leading the student to unknowingly and unintentionally violate their status. This unfairness is compounded when the status violation also serves as the "trigger" for the accrual of unlawful presence by dependents of students and exchange visitors.</p> <p>USCIS states that the purpose of the new guidance is to "reduce the number of overstays" and "to improve how USCIS implements the unlawful presence ground of inadmissibility." Unfortunately, this approach accomplishes neither of these goals and will instead unfairly punish a potentially significant portion of the student and exchange visitor population, further erode foreign student enrollments at U.S. colleges and universities, and unnecessarily damage the U.S. economy. I urge USCIS to abandon this misguided directive and to maintain the unlawful presence guidance that has been in place for decades and ensures that fundamental fairness is a critical component in interpreting and implementing the unlawful presence statute.</p>	
Claudia Slovinsky Claudia Slovinsky and Associates, PLLC 	<p>I urge USCIS to abandon this misguided directive and to maintain the unlawful presence guidance that has been in place for decades and ensures that fundamental fairness is a critical component in interpreting and implementing the unlawful presence statute.</p> <p><u>Comments attached.</u></p>	

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New York, N.Y. [REDACTED] [REDACTED]		
Cathryn Kane [REDACTED]@ [REDACTED]	I support the proposed changes in their entirety.	
Amy R. Weir Director of International Programs Wabash College [REDACTED]@ [REDACTED]	<p>I write today in response to the U.S. Citizenship & Immigration Services' (USCIS) policy memorandum of May 10, 2018, "Accrual of Unlawful Presence and F, J, and M Nonimmigrants (PM-602-1060)." The proposals in this memorandum are an extreme departure from more than 20 years of policy guidance and signify a radical change in the USCIS' interpretation and application of the regulations related to the accrual of unlawful presence by those in F (student), J (exchange visitor), and M (vocational student) status.</p> <p>As the Principal Designated School Official (PDSO) and Responsible Officer (RO) at Wabash College, I was alarmed and upset to read the USCIS' proposed changes. Wabash College enrolls international students from 17 countries and employs scholars from abroad. The international students, staff, and faculty on our campus bring unique and valuable perspectives and experiences to our classrooms, important ideas for discovery and innovation to our labs, energy to our student organizations and activities, and dynamic leadership to our campus community.</p> <p>Most of my daily work consists of advising international students on how to maintain their visa status, and I've found that essentially every international student wishes to comply with immigration regulations; students don't come here with the goal of violating their status. However, it becomes difficult to advise these students on issues of status maintenance when an important regulatory interpretation takes a dramatic shift away from a long-standing policy of the past. It's challenging for students and scholars to balance keeping up with changing immigration regulations on top of all the academic, institutional, familial, and societal demands they are already juggling. Like their American counterparts, international students should be allowed to complete their studies at their chosen institution without stress or fear of being deported based on an oversight of which they may not be aware.</p> <p>International Educators, including P/DSOs and A/ROs, have been discussing this new memorandum at length. Many of us are concerned about how we can advise F/J/M visa holders without inadvertently engaging in the unauthorized practice of law. (A majority of us are not immigration lawyers and were not trained as such.) We acknowledge and appreciate that changes in immigration regulations occur.</p>	

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	<p>However, the proposals in this new memorandum are especially problematic because they are such a pronounced departure from the long-standing, common-sense interpretation of visa regulations that has been in place for over 20 years. These changes are difficult to understand, and they are difficult to explain to those affected.</p> <p>I agree with Esther D. Brimmer's assessment of the situation. In her May 24, 2018 response to the memo, the Executive Director and CEO of NAFSA: Association for International Educators, states, "This memo eliminates the long-held distinction between <u>violating immigration status</u> and <u>being unlawfully present in the United States</u>... DHS now proposes to directly equate a violation of nonimmigrant status accorded under INA 214, with the start of counting days of unlawful presence under INA 212(a)(9)(B)." (Emphasis mine, and I am attaching a copy of NAFSA's Comment Letter from May 24, 2018 on this matter so you can see from where I drew some of my ideas.)</p> <p>Additionally, these proposals create a system where F/J/M visa holders may be found to have violated their visa status <u>years after the violation occurred without timely notice from the government</u>, which is particularly troubling since this memorandum attaches the possibility that this type of violation could result in individuals being barred from entering the U.S. for three years, 10 years, or permanently.</p> <p>These penalty bars are high for individuals who suddenly and unexpectedly find themselves in violation of status, especially considering that they didn't commit a felony, or even a misdemeanor. If enacted, this new interpretation of the regulations will cause a great deal of uncertainty for F/J/M visa holders here into the future, and the policy will act to make the U.S. a less attractive destination for talented individuals to study, work, and make meaningful contributions. The talent that we have long relied upon to fuel innovation in the U.S. will simply choose to do their important research and establish professional connections in more welcoming countries. Please don't put U.S. institutions of higher education and our society at large at a disadvantage.</p> <p>Given the background of the current policy, the complexity of the distinction between a status violation (even a minor technical one) and unlawful presence, and the question of the fairness of the penalties in INA 212(a)(9)(B), I support the recommendations set forth by NAFSA: Association for International Educators. In lieu of implementing the policy described in the May 10, 2018 memorandum:</p> <ul style="list-style-type: none"> · Leave in place the current policy, which has served for over 20 years. Neither DHS nor legacy INS ever published regulations to implement this important area of law. If the agency wishes to implement such a drastic change to longstanding common interpretation of the law, it must be done 	

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	<p>through the notice and comment process.</p> <ul style="list-style-type: none"> Do not implement any policy change until implementation has been fully coordinated with the Department of State and other DHS units such as CBP and SEVP. Exclude from the unlawful presence count any status violations that occurred under color of law, to avoid "gotcha" scenarios, where the student reasonably relied on the authorizations granted. For example, curricular practical training authorized in SEVIS that DHS later determines may have been improperly given, should not start the unlawful presence "clock" until HDS or an immigration judge makes a formal status determination. Apply the change of status/extension of stay tolling rules to reinstatement applications. Expand the sections describing examples where F, M, and J non-immigrants "do not accrue unlawful presence in certain situations." [Draft Adjudicator's Field Manual 40.9.2(b)(1)(E)(iii)]. <p>Thank you very much for providing this opportunity to comment. If you have any questions concerning my recommendations above, please contact me by calling (765) 361-6078 or by writing to weira@wabash.edu.</p>	
Dhana Kotha 	<p>I am here to add my 2 cents on the <u>new draft USCIS</u> has put forth for CPT.</p> <p>When I was a kid, I was taught "<i>Let a hundred guilty be acquitted, but one innocent should not be convicted</i>" if the new draft is implemented, I feel, many smart working would have to leave US.</p> <p>For instance, I have a friend whose H1 did not get picked in "The Lottery" for 5 consecutive times (this time too, no luck). My friend is smart and hard working person, just because of the poor luck in the lottery, will be asked to leave the country and also will be banned for years to enter United States. My friend has come with a ton of dreams to learn during masters and also to inculcate work culture during the H1 tenure in US and leave the country for good.</p> <p>But, with the lottery system, dreams are shattered and just left with loans and home works every day. Routine work is just to work, do homework and group projects and A little social life.</p> <p>Please, I urge against the implementation of this proposed policy memo.</p>	

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	<p>· Please help in changing the H1 lottery system to MERIT based system.</p> <p>· If there has been a great research done by USCIS and wanted to implement the proposed new draft on the CPT, please do NOT apply this for existing CPT students; possibly apply to future students. A future student will be aware of this new clause of CPT/OPT and they will be prepared accordingly.</p> <p>My friend above is just an example. I have seen many people spending most of their valuable time which they can spend on working and learning new technologies and doing certifications, in just doing home works. (Technologies in the real time world are faster these days than ever, and just bookish knowledge would never help in the current day job market.)</p> <p>Please be considerate on this! Please don't punish the poor luck fellows there is nothing they could do. Please!</p>	
<p>Erica Loomba Attorney at Law Proskauer [REDACTED] Newark, NJ d. [REDACTED] f. [REDACTED] [REDACTED]@ [REDACTED]</p>	<p>Please see my attached letter.</p>	
<p>George C. Maxwell, Esq. Attorney Scott M. Borene, Esq. Senior Attorney</p> <p>Borene Law Firm – U.S. & Global Immigration [REDACTED] Minneapolis, Minnesota [REDACTED] v: [REDACTED] f: [REDACTED] [REDACTED]@ [REDACTED]</p>	<p>Please find attached our respectfully submitted signed comment. I have pasted the body of the comment into my electronic communication to ensure delivery.</p> <p>Borene Law Firm P.A. submits the following comments in response to USCIS's proposed May 10, 2018 Policy Memorandum on Accrual of Unlawful Presence and F, J, and M Nonimmigrants, PM-602-1060 (May 2018 Memorandum), interpreting the INA § 212(a)(9)(B) and (C) as it applies to those classifications of non-immigrants. We recognize the concerns that United States Citizenship and Immigration Services (USCIS) seeks to address concerning a very small minority of students in F, J, and M non-immigrant status, who do not strictly comply with the rules by failing to report, failing to enroll in a course of study, or remaining as an F, J, or M after their regulatory grace periods. The proposed changes in the May 2018 Memorandum USCIS will create many more problems than they will solve for USCIS, for institutions of higher education, and for the students. Consequently, we respectfully disagree with the changes proposed in the May 2018 Memorandum. We urge USCIS to continue to apply the guidance for F, J, and M non-immigrants set out in the May 6, 2009</p>	

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	<p>Memorandum on Consolidation of Guidance Concerning Unlawful Presence for Purposes of Sections 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I) (May 2009 Memorandum).</p> <p>USCIS's proposed change in the May 2018 Memorandum (May 2018 Memorandum) would treat a violation of status as the end of a period of authorized stay for F, J, and M nonimmigrants in INA § 212(a)(9)(B)(ii), which is a radical change from USCIS' historical interpretation. This change in statutory interpretation is not reasonable. The change also is indefensibly inconsistent with USCIS's interpretation of "after the expiration of a period of stay authorized by the Attorney General" in INA § 212(a)(9)(B)(ii) as applied to other non-immigrant classifications. The new interpretation proposed in the May 2018 Memorandum also runs counter to congressional intent expressed in INA § 212(a)(9)(B) which is to provide sufficient notice in advance of the application of an impending bar for inadmissibility so that affected individuals may depart before a bar goes into effect. In addition to violating congressional intent, the method proposed in the May 2018 Memorandum permitting the USCIS adjudicator to retroactively determine a past "gotcha" status violation based on the vaguely defined term "any unauthorized activity" and then determine the amount of unlawful presence accrued violates fundamental norms of constitutional due process. Finally, the new memorandum procedures would discourage voluntary disclosure of status violations, which is not in USCIS' best policy interests.</p> <p><u>Borene Law Firm P.A.:</u> Borene Law Firm P.A. is a boutique immigration law firm. For over 30 years, we have advised clients in higher education and F-1 and J-1 students as well as other clients on complex and routine immigration matters. Scott Borene has more than 35 years experience representing many colleges and universities in higher education immigration matters. Mr. Borene is a member of NACUA – the National Association of College and University Attorneys and a member of the American Immigration Lawyers Association (AILA). Scott Borene is a past Director of the Board of Governors of the American Immigration Lawyers Association, past Co-Chair of the Immigration Law Committee of the International Bar Association, past Chair of the Immigration Section of the Minnesota State Bar Association, and is a past Chair of the AILA Minnesota Dakotas Chapter. George Maxwell also has considerable experience representing colleges and universities in higher education immigration matters and is a member of AILA. He is also a past Chair of the Immigration Section of the Minnesota State Bar Association and is currently Chair of the AILA Minnesota Dakotas Chapter.</p> <p><u>The May 2018 Memorandum Introduces a Contradictory Statutory Interpretation of the Phrase "After the Expiration of a Period of Stay Authorized by the Attorney General" in INA 212(a)(B)(ii) Which Violates the Standards for Agency Interpretation.</u></p> <p>With this Policy Memorandum, USCIS has adopted a contradictory, and therefore, unreasonable</p>	

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	<p>interpretation of the phrase “after the expiration of a period of stay authorized by the attorney General” in INA 212(a)(B)(ii) for F, J, and M non-immigrants. USCIS’s decision to change this interpretation only for F, J, and M non-immigrants is not defensible under the standard set out for agency interpretation of statutory language in <u>National Cable & Telecommunications Ass. et. al. v. Brand X Internet Serv. et al.</u>, 545 U.S. 967, 980 (2005). Under <u>Brand X</u>, the agency interpretation only receives deference if the statutory term is ambiguous and if implementing the agency’s construction is reasonable. <u>Id.</u> citing <u>Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.</u>, 467 U.S. 837 (1984). This review applies when the agency is changing prior policy. <u>See Id.</u> at 982. <u>See also</u>, <u>Barrientos v. Holder</u>, 658 F.3d 1222, 1227 (10th Cir. 2011). However, agency actions are considered arbitrary when the agency offers insufficient reasons for treating similar situations differently. <u>Dongbu Steel Co. v. United States</u>, 635 F.3d 1363, 1373 (Fed. Cir. 2011). This is particularly true where the agency has interpreted one term inconsistently and has not provided a reasonable explanation for “why the statute supports such inconsistent interpretations.” <u>Id.</u></p> <p>With the May 2018 Memorandum, USCIS has adopted an interpretation of “after the expiration of a period of stay authorized by the Attorney General” in INA 212(a)(B)(ii) for F, J, and M non-immigrants that directly contradicts its interpretation for every other non-immigrant category without any reasonable explanation for doing so. In the May 6, 2009 Memorandum and in prior agency memoranda, USCIS had interpreted the statutory term in 212(a)(9)(B)(ii) “after the expiration of a period of stay authorized by the Attorney General” to mean a defined period of time which expressed a date certain at a specific time designated by the appropriate U.S. government agency. <u>See</u> May 6, 2009 Memorandum at 9-12. This defined period of stay was the stated period of time given to the non-immigrant upon admission to the United States or by USCIS if that non-immigrant changed or extended their status while in the United States. (<u>See Id.</u>) It was a time period unambiguously known to all with plenty of notice prior to the expiration of that date, which enables the non-immigrant to leave the United States before becoming unlawfully present for a single day much less 180 or 365 days.</p> <p>In the May 2018 Memorandum, USCIS interprets the same phrase “after the expiration of period of stay authorized by the Attorney General” for only F, J, and M non-immigrants as something other than a fixed date known in advance and provided by a U.S. agency. <u>See</u> May 2018 Memorandum, at 4. Instead, non-immigrants in the F, J, and M categories under the May 2018 Memorandum would have their authorized period of stay end if they engage in any activity that USCIS decides after the fact was an alleged “unauthorized activity” in violation of their F, J, or M status. This is an impermissibly vague standard, which does not provide a person with sufficient reasonably detailed specific notice to allow them to conform their conduct to the rule. The accrual of unlawful presence would not begin with USCIS’s decision, but instead, on whatever date USCIS finds retroactively that such “unauthorized</p>	

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	<p>activity” occurred. (See <i>Id.</i> at 4-5). This means that F, J, and M dependents and many F, J, and M students themselves may discover for the first time that they have been unlawfully present more than 180 or 365 days after the alleged unauthorized activity, and long after the student has already become subject to the bar upon departure, thereby depriving the student or exchange visitor of the opportunity to leave and avoid the 3 or 10 year bar of inadmissibility. (See <i>Id.</i> at 4-5). By contrast, all other non-immigrant statuses will not incur unlawful presence until after a status violation has been decided by USCIS in writing or after overstaying a date certain. USCIS provides no reasonable explanation for the contradictory statutory interpretation, making its about-face statutory interpretation for F, J, and M non-immigrants unreasonable, arbitrary, and unlikely to withstand challenge in federal court. See <i>Dongbu Steel Co.</i>, 635 F.3d at 1373. For this reason alone, USCIS should apply the same interpretation of the statute for all non-immigrants as set forth in the May 2009 Memorandum.</p> <p><u>The May 2018 Memorandum Frustrates the Congressional Statutory Framework and Intent That Was Meant to Encourage Non-immigrants to Depart Before the 3 or 10 Year Bar for Unlawful Presence Began Because USCIS’ Methods Do Not Ensure That F, J, and M Non-Immigrants Will Have Sufficient Advance Notice</u></p> <p>If contradictory statutory interpretations of the same phrase in INA 212(a)(9)(B)(ii) were not sufficient reason alone to withdraw the May 2018 Memorandum, USCIS’s May 2018 Memorandum also is inconsistent with congressional intent and the statutory framework for unlawful presence, because it provides insufficient advance notice for the F, J, M non-immigrant to take action before a bar to admission applies. USCIS’s existing interpretation in the May 6, 2009 Memorandum of using a date known well in advance by the non-immigrant before unlawful presence begins to accrue is consistent with the statutory scheme established by Congress. Congress clearly intended to provide non-immigrants with a significant period of time – 180 days - to depart before a harsh penalty (a 3 year inadmissibility bar) was imposed after unlawful presence began in order to save the expense of a removal hearing and for other reasons. INA 212(a)(9)(B)(i)(I). In fact, Congress even provided non-immigrants who stayed longer than 180 days with an exception to the 3-year bar so long as they departed voluntarily after the commencement of proceedings by the issuance of a notice to appear. INA 212(a)(9)(B)(i)(I). The May 2018 Memorandum by contrast is not consistent with congressional intent in the statute because the method USCIS intends to use is unlikely to provide sufficient advance warning to F, J, and M non-immigrants to depart in order to avoid the 3 or 10-year bar of inadmissibility. In fact, for F, J, and M non-immigrant dependents, who are found to be unlawfully present due to an alleged violation by their principal, USCIS’ decision that they are unlawfully present may be the first notice that person receives, which could be long after the person has accrued 180 days or 365 days of unlawful presence. Accordingly, USCIS should continue to use the interpretation in the</p>	

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	<p>May 2009 Memorandum for F, J, and M non-immigrants, which is consistent with the congressional intent evident in the structure of the statute.</p> <p><u>The May 2018 Memorandum Not Only Violates Due Process in Failing to Provide Sufficient Notice and Opportunity to Take Action Before the 3 and 10 Year Bars Are Imposed but Also Because USCIS Has Not Defined What Kinds of Actions Might Constitute “Unauthorized Activity” Leading USCIS to Find Unlawful Presence</u></p> <p>In addition to frustrating Congress’ intent, The May 2018 Memorandum interpretation of INA 212(a)(9)(B) and (C) violates the due process required in the 5th and 14th Amendments of the U.S. Constitution, because it violates one of the most basic tenets of due process, which is fair notice. See <u>Sessions v. Dimaya</u>, 584 U.S. ___, No. 15-1498, Slip Op. of Gorsuch J. at 3 (2018)(Gorsuch J. concurring) (citing <u>Connally v. Gen. Constr. Co.</u>, 269 U.S. 385, 391(1926)). In <u>Sessions v. Dimaya</u>, the Supreme Court found a type of “aggravated felony” defined by the INA to be unconstitutionally vague in violation of due process, because the statutory language did not give notice in advance of the commission of the crime whether a particular crime was an aggravated felony or not. <u>Dimaya</u>, Slip Op. at 24.</p> <p>The process to determine when a violation occurred and to provide notice that a non-immigrant is unlawfully present also fails to provide sufficient notice to satisfy due process requirements. The statute is designed to provide a non-immigrant with sufficient time to leave the United States before a 3 or 10-year bar applies. INA § 212(a)(9)(B)&(C). USCIS under the May 2018 Memorandum makes no provision to ensure that F, J, and M non-immigrants receive sufficient notice in advance to ensure departure before a bar to admissibility applies because USCIS will be reviewing conduct retroactively potentially over an indeterminate span of months or years searching for a violation as part of any benefit request. May 2018 Memorandum at 4-5. For F-1 students, USCIS may review past activities covering 4 years or more after the fact, after the F-1 has graduated and seeks optional practical training, which ensures that USCIS’s determination that a violation occurred years ago could mean that the F-1 Student and any dependents are already in jeopardy of incurring a 10-year bar to admissibility upon departure from the U.S. (Id.)</p> <p>Similarly, the vague phrase in the May 2018 Memorandum on page 4 that an “unauthorized activity” could cause an F, J, or M non-immigrant to become unlawfully present does not provide any notice to anyone as to what USCIS believes that such activity is. Also, USCIS itself may not be able to identify a uniform definition of unauthorized activity because many of the rules for F, J, and M students for registration, drop/add classes, majors, and other rules are set by the hundreds of SEVIS-approved schools, colleges and universities. By definition, the vagueness of this phrase, together with the</p>	

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	<p>inherent complexity of applying the differing rules of hundreds of different college, university, and school policies make this a constitutional due process tangle, which USCIS would be wise to avoid.</p> <p>Because USCIS's May 2018 Memorandum violates constitutional due process norms, USCIS should not apply it and instead should continue to use the May 2009 Memorandum interpretation.</p> <p><u>The May 2018 Memorandum Is Bad Policy and May Lead to Less Self-Reporting for Reinstatement of F, J, and M Status</u></p> <p>Any change should attempt to encourage compliance and encourage F, J, and M non-immigrant students to self-report mistakes that occur. This proposed change does not encourage compliance. In the May 2018 Memorandum, USCIS intends to have students who self-report a mistake and seek reinstatement start accruing unlawful presence on the date of the mistake and to allow the unlawful presence to continue to accrue while the request is pending. See May 2018 Memorandum, 10-11 footnote 29. Many reinstatement requests pend a significant period of time before adjudication, which will cause the student to have to decide whether to forgo even applying for reinstatement because the risk of denial after a 180 or 365 day adjudication delay is catastrophic. If a student nevertheless applies for reinstatement and it is not timely granted, the student may become subject to a 3 or 10 year bar while waiting. (Id.) Given that potential consequence, many students with a well-founded basis for reinstatement may chose not to seek reinstatement at all.</p> <p><u>Conclusion</u></p> <p>We offer these constructive comments to USCIS in the hope that USCIS will continue to use the May 2009 Memorandum to apply to all non-immigrants including F, J, and M non-immigrants and abandon the May 2018 Memorandum as ill-considered. The May 2009 Memorandum is consistent with the historical interpretations of the statute, consistent for all non-immigrants, consistent with congressional intent, more protective of due process, and better policy.</p> <p>We recognize USCIS's concern with F, J, and M non-immigrants who stay past the permitted grace period or fail to enroll in a course of study and yet remain. If USCIS determines that a policy change must be made, USCIS should instead consider modifying the May 2009 Memorandum guidance for F, J, and M non-immigrants by adding that the specific date of termination of an F, J, or M non-immigrant's record in SEVIS by the Designated School Official(DSO), Responsible Officer(RO), or Alternative Responsible Officer (ARO) for failure to appear or failure to register for a course of study would be the trigger to begin the accrual of unlawful presence. This modification would be consistent with other instances in the May 2009 Memorandum that begin the accrual of unlawful presence for F, J,</p>	

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	<p>and M non-immigrants admitted for duration of status (<i>i.e.</i> written decisions by an immigration judge or a USCIS officer that F, J, and M non-immigrants have failed to maintain status). It also raises few of the constitutional due process and other issues raised in our comment.</p> <p>Accordingly, for the reasons stated, we ask that USCIS revisit its method of achieving that policy goal and consider other options more consistent with the congressionally-mandated statutory framework, due process, existing policy and past guidance. We thank you for the opportunity to comment on the proposed policy memorandum change.</p>	
<p>Crystal Ann Barker [REDACTED]@[REDACTED]</p>	<p>I'd like to see .. the threat of eliminating foreign-born students from our universities raised above mere politics.</p> <p>This issue is far too important to the U A than merely whether one supports President Trump or not. And will be present in our public discourse LONG after Trump is gone... Indeed, we have building up to this point for decades...</p> <p>This issue is of such importance to the U of A (and surrounding) community.... I am surprised that students and others would be instructed to manipulate social media.</p> <p>The fact that our grad schools in technical areas will <i>close</i> without foreign-student attendance concerns everyone. (Look up the statistics yourself. If Americans attend grad school in technical areas (engineering and physical sciences) they typically terminate at masters level...)</p> <p>The fact is, foreign student presence enables American-born students to continue in graduate studies that otherwise would not just be too expensive but in depts that would be forced to close their doors (would cease to exist) if they stopped attending.</p> <p>I am sure the President of the university knows this.</p> <p>America is in the middle of a crisis with regard to technical education. And set in motion looong before the likes of Trump was elected.</p> <p>While we continue to (mindlessly...) fuel and fund STEM (in some vague support of " math and science"), and even after <i>so much effort</i> and good intention ... most Americans (even among our "best educated", even among our privileged class (middle- and upper-middle-class) increasingly, American students not only reject study in the physical sciences but even those American-born students who are motivated, are not prepared to advance in most technical areas.</p> <p>(While we "support math and science" the university continues to ... "adjust" science reqmts (for ex in medicine... those selected for medical school are selected for business acumen (I guess?) and "personality"(?) I guess... high test scores/ood grades sure but most doctors do no more than follow the edicts of the AMA ...and prescribe drugs that have no basis in science (keep in mind, as someone</p>	

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	<p>afflicted with chronic health issues across the lifespan, I can tell you firsthand ... science and math <i>matters...</i> (If you doubt what I say (cause you are not chronically ill... then look up the stat's on how many medical school students have any more science than the "pre-med" year of pro forma, watered-down science and math curricula (for which btw, early in my UA career, I tutored such students through these reduced reqmts...(Imagine the sense of irony I must feel...))</p> <p>As a grad student in Applied Math (currently pursuing a grad certificate as well as having undertaken grad study in several areas...), a former math teacher myself (community college, HS, middle school...), former ESL instructor, a former employee of Raytheon (retired now), returning to attend grad school "later in life", I was not only surprised to see no more females in my grad classes in engineering and math than <i>more</i> than 20 years ago (when first I attended the UA in these areas)... but so few <i>American</i> students...</p> <p>(Although I will say that my professors are just as gifted and dedicated and creative... as ever (and comprising both American-born, foreign-born, male/female alike....))</p> <p><i>Without foreign-born students--</i> who come here to pursue studies they cannot get online or in their home countries (most of us in technical areas can tell you that most of this stuff cannot be effectively pursued in isolation or online...), who appreciate the dedicated and world-class faculty at the U of A--it is <i>not</i> just that the doors (to engineering and math) may close, but that all American students on campus (in technical/non-technical areas). will lose their only opportunity to see that the world is bigger than America ... (America being one of the most isolated cultures on earth, I think now--with those Americans who have enough money to travel <i>anywhere</i> in the world (and <i>do</i>) ...effectively managing to "bring" Amercia with them wherever they go...)</p> <p>One might be more progressive or more conservative, politically speaking ... but America stagnates without the enrichment "the Other" offers (I guess that is my grad course in post-colonial studies paying off...)</p> <p>One may lean against illegal immigration (or not) ... support limitations on legal immigration or support "free borders"; but when engineering or math students sit side by side in an advanced class... they cease to <i>be</i> American or foreign (or male or female for that matter...)</p> <p>Pursuit of advanced work in the physical sciences requires more than brains and money... it requires something more than just time and commitment .. (I cannot think of a discipline that doesn't require commitment ... But science and math is what I know personally...)</p> <p>The acquisition of such knowledge, even for those brightest and most motivated among us, is HARD.</p>	

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	<p>(People can tell you how impt is math and science; but when you work to solve a problem that might take weeks to solve... if it <i>can</i> be solved... (keeping in mind, many problems in science can not be (so I laugh every time I hear someone set a new timetable to "solve cancer" or "push back climate change" ...)</p> <p>...</p> <p>People and institutions can push STEM studies all they want, but at 3 am ... all the nice words and encouragement... about how impt is science.. won't keep one going... (Nor is any promised pay raise a real incentive at that point either...(which I also regretfully know from hard experience..))</p> <p>Our gifted science faculty helps in myriad impt ways (beyond mere encouragement); but "in the trenches" it is all about the science and math itself.</p> <p>And those of us who are up at 3 am still grinding through calculation and analysis would be hard-pressed without the energy of our fellow grad students.</p> <p>And for most of us American grad students, our fellow grad classmates... are from China or India or the Middle East...or Mexico.. or the eastern block...</p> <p>More than just subsidizing grad study for American-born grad students though, these students are intelligent, creative, and PREPARED students.</p> <p>Our <i>best</i> students ARE foreign students.</p> <p>(Not to mention that these students make employment possible for the gifted instructors/prof's in these areas... who otherwise would likely not have a position...)</p> <p>(As a suggestion for your campaign, I urge you to check out and publish HOW MUCH foreign students typically pay in tuition and other fees... and contrast that with how much an education would cost an American-born grad student IF we bore the cost ourselves (assuming that grad school in engineering (in physical sciences in general) would even be available without the continued support of these able students...)</p> <p>You know... I mostly don't concern myself with the on-campus political issues of the day. Not because I have no opinion... or don't care...I marched in the 60s with my mother and father (and neighbors) for blacks and in the early 70s for women ... I have a bit of a tough time with the current PC milieu... I am NOT a feminist.</p> <p>Like a lot of people, I viewed the younger generation as a bit spoiled and not a little bit narcissistic. To the point of how impt being around people who are diff't than we, though... I will offer that on the occasion I have been forced to interact with younger students...I found .. they are sensitive and idealistic ... and from them, I learned to see the world a bit differently (which allowed me to make overtures to my own millennial...)</p>	

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	<p>In fact, I make a policy to keep mum on politics on campus cause in general, cause at my age, however misguided I think the younger students' latest cause celebre, I believe it is their right to find out for themselves...</p> <p>Engineering, the physical sciences ... may be dominated by males; but that is only a <i>description</i>. While the implication--that I, as a woman, will have a "tough time" ... or won't be able to compete...(cause ostensibly, I won't be allowed to?) is just wrong. A lot of us "gals" have found out that often the lab is the ONLY place where the focus is on a result and NOT on which college I attended, who I married, what my husband does for a living, how much money I have, or... how good looking I am... or what color I am.. or what religion I practice...</p> <p>Supporting foreign-born students is important. But should be cast as more than a political issue. (It is NOT just Trump... nor is it just the RIGHT... there is plenty of people on either side of the aisle who don't understand this issue....)</p> <p>An issue of such importance should bring us all together... not force us into "us" and "them" categories that colors political discourse lately... I am at least old and wise enough to understand that division doesn't serve anyone's agenda in the long run...</p> <p>If there is anything I can do to further this discussion... or to support foreign students (or foreign instructors) at the U A , please let me know. Recovering currently from illness (taking yet another hiatus from school) I have time.</p> <p>I have benefited directly in countless ways from every interaction I have had with my foreign-born classmates. I would be less without them...</p> <p>Thank you.</p> <p>(Please use suggestions; but avoid using my name.)</p> <p>Crystal Barker</p> <p>On Thu, Jun 7, 2018 at 8:50 AM, Teemant, Marie Elizabeth - (marieteemant) <marieteemant@catworks.arizona.edu> wrote: Hello Graduate and Professional Students,</p> <p>Below is a statement released by the National Association of Graduate-Professional Students (NAGPS) regarding recent changes to how policies regarding citizenship and continued stay on specific visas are being implemented and changed. We are looking into the matter and consulting with ISS regarding how this will effect students on a practical level and will provide that information as soon as</p>	

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	<p>possible.</p> <p>In the meantime, we wanted you to be aware that we are looking at what may arise for students graduating and will continue to inform you of updates and changes. Please continue to follow our social media and share this information with International Students who may not receive the GPSC newsletter.</p> <p>Marie E. Teemant GPSC President</p> <p>June 6, 2018</p> <p>Dear NAGPS members,</p> <p>On May 11, 2018 the U.S. Citizenship and Immigration Services (USCIS) released a policy memorandum proposing a change on how they will start counting the days of "unlawful presence" of international students and their spouses under F, J and M visas starting on August 9, 2018. We believe this proposed change would have detrimental consequences for our international student colleagues and we need your help to advocate for them. This step is being taken as a part of President Trump's executive order to enhance public safety in the interior of United States.</p> <p>NAFSA (Association of International Educators), one of our partner organizations, states that the statutory provisions that penalize the international students for their overstay (or "unlawful presence") are not new; they were added to the Immigration and Nationality Act by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA). However, under the proposed guidance, USCIS would change the way it "counts" days of unlawful presence for F-1, F-2, M-1, M-2, J-1, and J-2 nonimmigrants. A summary of the proposed changes is provided below:</p> <ul style="list-style-type: none"> • Under the current policy, which has been in place for 20 years, the unlawful presence count begins only after a formal finding of a status violation by a DHS officer in the course of a benefits application, or by an immigration judge in the course of removal proceedings. • Under the newly proposed policy, the unlawful presence count begins the day after the status violation. • Under both the current and proposed policies: • Remaining in the United States beyond the expiration of a date-specific Form I-94 also starts 	

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	<p>the unlawful presence clock; and</p> <ul style="list-style-type: none"> There are a number of important exceptions (such as unlawful presence not being counted if USCIS approves a student's application for reinstatement) <p>The NAGPS and other organizations that advocate for international students believe that the proposed changes would unnecessarily penalize some of our brightest international graduate-professional students, scholars, and their families. Thus they are taking all possible measures to make sure this proposal does not move forward. However, we acknowledge the fact that personal stories from people who are going to be impacted from the proposed changes would play a much more powerful role than the measures that we are taking to ensure that the current provisions stay. Thus, this email requests all of you to please submit your stories directly to the USCIS website here by June 11, 2018. Additionally, we request you to share your story on how this proposal can jeopardize your personal and professional endeavors. Please consider sharing your story with a picture holding an imprint stating your situation to your social media so this drastic change can receive the proper attention of concerned people, media, federal authorities, and the lawmakers of this country. Please refer to a few examples at the end of this document.</p> <p>Should you have any questions, please feel free to reach out to Karen F. Da Silva, International Student Concerns Advocate at icss@nagps.org or Rajesh Kumar, Advocacy Board Chair at advocacy@nagps.org. Please email all comments to publicengagementfeedback@uscis.dhs.gov.</p>	
<p>Ester Greenfield Attorney MacDonald Hoague & Bayless [REDACTED] Seattle, WA Office Phone [REDACTED]; Cell phone: [REDACTED]</p>	<p>The USCIS policy memo on accrual of unlawful presence for foreign students, "Accrual of Unlawful Presence and F, J, and M Nonimmigrants," posted by U.S. Citizenship and Immigration Services (USCIS) on May 11, 2018, is wrong and ought to be rescinded.</p> <p>"Unlawful presence" is a legal term based on section 212(a)(9)(B)(ii) of the INA and refers to someone who "is present in the United States after expiration of the period of stay authorized by the Attorney General or is present in the United States without being admitted or paroled." Students and exchange visitors in the F, J, and M categories are granted entry in "D/S" which means duration of their status. They do not have an I-94 with a date that clearly informs them how long they may remain in the U.S. As a result, legacy Immigration and Naturalization Service (INS) and USCIS have interpreted the statutory unlawful presence provisions to require notice to the individual of a status violation prior to the commencement of the unlawful presence clock. USCIS will provide this type of notice when it is adjudicating a request for an immigration benefit or the matter is before an immigration judge to determine whether the student has violated status. The USCIS guidance said: "It must be emphasized that the accrual of unlawful presence neither begins on the date that a status violation occurs, nor on the day on which removal proceedings are initiated." [1] This longstanding policy provides certainty in</p>	

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	<p>determining when unlawful presence begins to accrue. The new policy conflates a status violation with accrual of unlawful presence.</p> <p>Per the May 11, 2018 policy memo, USCIS will now deem unlawful presence to have started accruing as of the day after the date that a status violation occurs, thus removing the critical procedural safeguard of providing notice to affected individuals that may find themselves subject to the three- and ten-year bars to admissibility. This raises serious questions regarding fundamental fairness and due process and will have a significant negative impact on the student, vocational, and exchange visitor communities.</p> <p>To maintain status, students must maintain a full course of study or remain in the exchange program, not engage in unauthorized employment or other unauthorized activities, and complete the academic or exchange program in a timely manner or obtain an extension.</p> <p>The question as to whether an individual has violated their nonimmigrant status is complex. If a student drops slightly below a full course of study, it could be a status violation. If a student transfers schools before the paperwork catches up, it could be a status violation. If the student babysits, it could be a status violation. If the DSO makes a mistake, it is the student who could suffer a status violation. If the school gets out of compliance with SEVIS, it could be a status violation that relates back to all of the students. Status violations may occur and the student doesn't even know. Activities that are normally paid but the student volunteers the work could be a status violation. If a professor unfairly extracts paid or unpaid labor from a student, it could be a status violation. If a student gets arrested, he or she may be notified that the F-1 visa is cancelled. Perhaps that would also be a status violation even if no charges are brought or the student is acquitted.</p> <p>Further, if the student doesn't know he or she committed a status violation, he or she could be in for an unpleasant surprise upon leaving the U.S. to apply for a new visa such as an H-1B visa. Some students do not leave the U.S. at all during their education and thus an unknowing status violation early in the student's academic career could trigger a ten year bar. We have heard of many students stuck in the U.S. due to the current travel ban; if the travel ban is lifted, some of them could be denied future visas because of an unknown and inadvertent status violation.</p> <p>The old policy worked and was not unfair to students. It provided a bright line test that was easier to administer.</p> <p>The stated purpose of the new guidance is to "reduce the number of overstay." It is likely to have the</p>	

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	opposite effect. If a student fears that he or she may have violated status, that student is more likely to overstay because leaving would subject him or her to the three or ten year bar. The imposition of the three and ten year bars dramatically increased the number of undocumented foreign nationals ever since IIRAIRA became law. The new student policy memo will augment that increase among the foreign student population.	
Margaret Kent [REDACTED]@ [REDACTED]	<p>I am writing to express my grave concern about and opposition to the proposed changes to when accrual of unlawful presence begins as described on page 4 of PM 602-1060.</p> <p>The proposed change which causes international students to begin accruing unlawful presence as soon as their studies have ended or have changed or their Form I-94 expires (instead of differentiating between unlawful presence and finding of non-immigrant status violation, as has been the case for nearly 20 years) has the potential to harm current international students and push away future talented students who may choose to take their intelligence, drive, and societal contributions to other counties instead.</p> <p>Why make America less competitive on the world stage? The US was built by motivated, ambitious newcomers of different nations from the beginning of our history. I urge the USCIS to drop this proposal and preserve the former INS policy.</p> <p>Thank you for your consideration.</p>	
Albert Mokhiber [REDACTED]@ [REDACTED]	Please note our concerns regarding the New USCIS Unlawful Presence Guidance in the <u>attached letter</u> .	
Carrie Henderson International Student Advisor/DSO Wichita State University Office of International Education Garvey International Center [REDACTED] Wichita, KS [REDACTED] Office: [REDACTED] Fax: [REDACTED] E-mail: [REDACTED]@ [REDACTED]	<p>As a DSO for an institution that hosts approximately 1200 current F-1 and J-1 students and 500 former students on OPT, I was extremely disheartened and concerned to read the new policy memorandum regarding unlawful presence. While at first glance it may seem prudent to apply unlawful presence penalties to a group of nonimmigrants who have violated the terms of their status, as an experienced school official, I must point out the extreme injustice in it being applied as stated in the memorandum.</p> <p>I would first like to point out that the memo states that this new implementation of existing policy is being done in an effort to, "reduce the number of overstays" but offers no evidence of how the actions mentioned will accomplish this goal. Is there any evidence to show that current status holders subject to unlawful presence penalties are less likely to overstay? If anything, I would think that USCIS is risking the opposite – people not leaving the U.S. at any point because the penalty does not affect them so long as they are here in the U.S.</p>	

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	<p>The application of this rule in situations where a nonimmigrant student “is no longer in a period of stay authorized” is extremely concerning. The memo does not explain how or that determination is made nor does it explain when the unlawful presence count is triggered. While in some cases, such as after the end of a grace period, this is fairly straightforward, in many cases it will not be as clear. Does the overstay count start from the date that the DSO/RO terminated or completed the SEVIS record? Or, since the memo states, “the USCIS officer should consider information relating to the alien’s immigration history,” does this mean a USCIS officer determines the point at which the unlawful presence is triggered? Either way, I can see a multitude of situations in which this will be unjust in the extreme, such as:</p> <p>1) The automatic SEVIS termination functionality for F-1 students who have exceeded their days of unemployment has not yet been turned on and DSOs have previously been instructed we are not responsible for determining when someone has exceeded their unemployment limits. It is hardly fair to students who exceed the unemployment limit (I might add, a rule that is completely arbitrary and punitive to students actively trying to find a job related to their major but unable to secure an offer within the set number of days allowed by law) and whose SEVIS records remain active to be accumulating days of unlawful presence. It may be years before USCIS has a reason to review the student’s SEVIS record and make an official determination that a status violation occurred, at which point the student could easily be subject to an automatic 10 year bar from reentering the U.S.</p> <p>2) P/DSOs and A/ROs are already saddled with the immense responsibility of determining when an F-1, J-1, or M-1 student has violated status. Contrary to popular belief, this determination is not always a black and white issue. While some rules such as the requirement to maintain a full course of study may on the surface appear to be clear cut, any seasoned advisor will tell you differently. For example, the rules regarding distance learning were written years ago, long before the proliferation of hybrid and online courses. Are hybrid courses allowable? Is there a minimum in-person to online ratio that is permitted? The regulation states, “No more than the equivalent of one class or three credits per session ... may be counted toward the full course of study requirement if the class is taken on-line or through distance education and does not require the student's physical attendance for classes, examination or other purposes integral to completion of the class that one online course up to three credit hours is allowable.” Some read that to mean a student may count no more than 3 credit hours in a distance learning format towards their minimum enrollment requirement each semester, but others interpret this rule to mean that only one course, up to three credit hours, is allowable, meaning that if a student takes a 1 credit hour online course, they may not count any other online courses towards their required 12 hours. Absent clear and specific guidelines, schools have had</p>	

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	<p>no choice but to create institutional policies regarding grey areas, resulting in an extremely wide variety of practices. A DSO at one school may terminate the SEVIS record of a student considering them to be in violation of status, when, had that same student attended another institution, they might not have considered a violation to have occurred. It is unconscionably cruel to subject students to a penalty that is not applied equally by all schools.</p> <p>3) Larger institutions often hear of smaller institutions failing to fulfill all administrative requirements in SEVIS. This is hardly surprising given that small schools have few resources available to them and DSOs may only handle one international student every few years. Unfortunately, this sometimes results in a SEVIS record not being updated appropriately and the SEVIS record may be automatically terminated due to no fault of the student. While some errors can be remedied with a simple correction or data fix in SEVIS, others cannot, and furthermore, the student and DSO may not even be aware of the problem. Applying unlawful presence to any student with a terminated record without any sort of oversight or appeals process is punitive in the extreme.</p> <p>4) The memo states that a student who applies for reinstatement is exempt from the unlawful presence provision "provided that the application is ultimately approved." Currently, USCIS processing times for the Form I-539 easily surpass six months. How is it fair to a student who timely files for reinstatement but is ultimately denied to be subject to a 3 year bar on reentering the U.S. simply because USCIS took 8 months to adjudicate his or her petition? The days of unlawful presence should not start accumulating until the date of the petition denial.</p> <p>5) In recent years, USCIS has become much stricter in their interpretation of immigration laws, resulting in increased number of denials for student benefits such as OPT. In many areas such as OPT and CPT, the regulations are vague and schools interpret them differently. One example of USCIS changing their stance on a rule is the STEM OPT rule that has been in effect since May 2016. In January 2018, USCIS surreptitiously updated their website to include a very strict interpretation of third party employment, going so far as to explicitly state that STEM OPT employment is only permitted when the employee is located on site with their supervisor and the company itself. This is not how the final rule reads. Since USCIS doesn't review the Form I-983 as part of authorizing STEM OPT but instead leaves it up to DSO to perform this task, what will happen in instances where, for example, the DSO approves the employment but USCIS later determines the employment to be unacceptable? Will the unlawful presence count apply retroactively to the day the student commenced said employment?</p> <p>I beg that USCIS reconsider such draconian measures which have obviously been proposed with little regard for their ramifications. The vast majority of F, J, and M visa holders that ever have a status violation have done so without intention, and any review of the most common infractions would surely show these violations are slight in nature, resulting in a huge disparity between the "crime" and the</p>	

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	punishment. These are people that have spent years in the U.S. building their professional and personal lives; to suddenly bar them from entering the U.S. for a violation that may have been unknown, unclear, or untrue is unreasonable and gratuitous.	
Enola French Coordinator Office of International Affairs Phone: [REDACTED] Fax: [REDACTED]	Please see attached comments .	
Deok Song [REDACTED]@[REDACTED]	<p>On May 10, 2018, U.S. Citizenship and Immigration Services ("USCIS") proposed a policy memo regarding the accrual of unlawful presence for F (student), J (exchange visitor), and M (vocational student) nonimmigrants. USCIS seeks public comment regarding the proposed changes until June 11, 2018.</p> <p>The proposed changes unfairly applies the law and triggers unlawful presence accrual for unsuspecting F, J, and M nonimmigrants who may not reasonably know about technical violations of status until years after the fact. Also, the proposed rule is inconsistent with existing statutes, regulations, and interpretations. The new policy change will create unintended legal and practical problems for all interested parties, including the U.S. government, nonimmigrants in these status, and the general public associated with these individuals. Thus, we respectfully and strongly urge USCIS to reconsider the implementation of the proposed policy and withdraw the proposed memo to take more time to thoroughly review it.</p> <p><i>1. Implementation Of The New Policy Will Create Uncertainty Over Accrual Of Unlawful Presence By Retroactively Triggering Unlawful Presence Period To Unsuspecting F, J, And M Nonimmigrants Who May Not Reasonably Be Aware Or Have Knowledge Of Their Status Violation Due To Technicalities And Will Not Have Reasonable Opportunity To Affirmatively Mitigate The Unlawful Presence Accrual Period.</i></p> <p>According to the proposed policy, an F, J, or M nonimmigrant will begin accruing unlawful presence on the day after the nonimmigrant fails to maintain his or her status. This is a significant departure from the current policy and could lead to extremely harsh consequence of 3- and 10-year bars to entry to students and exchange visitors who may only reasonably find out about the unlawful presence accrual until it is too late to make any change.</p>	

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	<p>Under the existing policy, an F, J, or M nonimmigrant starts accruing unlawful presence on the earliest of the following:</p> <ul style="list-style-type: none"> • The day after DHS denied the request for the immigration benefit, if DHS made a formal finding that the alien violated his or her nonimmigrant status while adjudicating a request for another immigration benefit; • The day after the Form I-94, Arrival/Departure Record expired, if the F, J, or M nonimmigrant was admitted for a date certain; or • The day after an immigration judge or, in certain cases, the Board of Immigration Appeals (BIA) ordered the alien excluded, deported, or removed (whether or not the decision is appealed). <p>Thus, an F, J, or M nonimmigrant will clearly be aware of the starting date of the accrual of unlawful presence and can make affirmative plans to comply with the law to avoid the potentially devastating consequences of unlawful presence.</p> <p>Under the proposed policy, effective August 9, 2018, an F, J, or M nonimmigrant starts accruing unlawful presence on the earliest of the following:</p> <ul style="list-style-type: none"> • The day after the F, J, or M nonimmigrant no longer pursues the course of study or the authorized activity, or the day after he or she engages in an unauthorized activity; • The day after completing the course of study or program (including any authorized practical training plus any authorized grace period, as outlined in 8 CFR 214.2); • The day after the Form I-94 expires, if the F, J, or M nonimmigrant was admitted for a date certain; or • The day after an immigration judge or, in certain cases the BIA orders the alien excluded, deported, or removed (whether or not the decision is appealed). <p>The changes proposed under the new policy can dramatically affect F, J, or M nonimmigrants by retroactively triggering unlawful presence to an unsuspecting student or exchange visitor who unknowingly engaged in a technical violation of their status. For example, regulations regarding employment for F students are complex, and many includes technical requirements that many students do not understand or are not even aware of. For instance, if the new rule goes into effect, an 18-year college freshman who, in good faith, volunteered for an off-campus internship without CPT could</p>	

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	<p>reasonably not find out about this potential violation of status until 3 or 4 years later after graduation during the H1B petition adjudication. Thus, due to the new policy change, this 21 or 22 year old person would unknowingly accrue 3 to 4 years of unlawful presence and will be barred from returning to the U.S. for 10 years.</p> <p>The new proposed policy unnecessarily creates uncertainty over the trigger date of unlawful presence and in the process severely punishes unknowing, unsuspecting students (many of whom are young people just starting their life) from returning to the U.S. for 3 or even 10 years.</p> <p>Moreover, as will be discussed below, the proposed policy change does not only revise AFM Chapter 40.9.2. The proposed revision will have ripple effects that create inconsistencies and contradictions with existing policy and interpretations of the law within DHS and with Department of State.</p> <p>2. <i>The USCIS Policy Memo Confuses the Distinction Between Violating Status and Unlawful Presence, Which Has Been Consistently Recognized in INA 212(a) and 237(a) As Pivotal to the Application of Other Sections of the INA</i></p> <p>The proposed policy memo at hand fails to distinguish between violating status and unlawful presence when determining the applicability of the guidance and policies contained in the memo. Existing statutes clearly and separately distinguish between these two distinct legal concepts. To disregard the need to delineate the applicability of published guidance to each of these concepts is arbitrary and capricious and contradicts existing government policy and interpretations.</p> <p>INA 212(a)(9)(B)(ii) defines the construction of unlawful presence circumstances: "an alien is deemed to be unlawfully present in the United States if the alien is present in the United States after the expiration of the period of stay authorized by the Attorney General or is present in the United States without being admitted or paroled" (emphasis added). The statute explicitly reserves unlawful presence for circumstances in which status has expired and no other period of stay has been authorized by the Attorney General. INA 237(a)(1)(B) further defines unlawfully present aliens as a class of deportable aliens and as "[a]ny alien who is present in the United States in violation of this Act or any other law of the United States, or whose nonimmigrant visa (or other documentation authorizing admission into the United States as a nonimmigrant) has been revoked under section 221(i)" (emphasis added). The statutes explicitly define unlawful presence as an expiration, as opposed to a mere violation, of status; an unlawful entry into the United States; or an affirmative revocation of documentation authorizing admission into the United States. A revocation would entail, for example, a determination by an</p>	

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	<p>immigration judge or the Department of Homeland Security, and unlawful presence would trigger at the moment of such action.</p> <p>Notably, INA 237(a)(1)(C)(i) specifically distinguishes nonimmigrant status violators from unlawfully present aliens, and separately defines nonimmigrant status violators as “[a]ny alien who was admitted as a nonimmigrant and who has failed to maintain the nonimmigrant status in which the alien was admitted or to which it was changed under section 248, or to comply with the conditions of any such status.”</p> <p>Thus, INA clearly distinguishes between status violations and unlawful presence as separate legal concepts with different legal consequences. Congress has chosen to distinguish these legal concepts and impose different severities of repercussions, likely because unlawful presence involved affirmative intent to stay beyond authorized period of stay whereas status violation could involve negligence in understanding requirements of maintaining a status, which often includes various technical violations. Nonimmigrants should be reasonably aware of when their authorized stay expires, and staying in the United States beyond such expiration assumes a level of intent, whereas a violation of status may be the mere product of negligence. The new policy would blur the distinction of these two statutory concepts, which would effectively create inconsistencies among different sections of the INA statutes without a good policy rationale.</p> <p>The USCIS policy memo, at a minimum, guarantees the avoidable outcome of an inconsistent statutory framework for immigration law and will inevitably lead to unnecessary litigation over the applicability of certain sections of immigration law and existing policy manuals.</p> <p>3. <i>The Proposed Policy Amends AFM 40.9.2(b)(1)(E)(i)-(iii), Which Will Cause Inconsistency with Other Sections of the Existing Adjudicators Field Manual</i></p> <p>The policy memo at hand primarily addresses AFM 40.9.2(b)(1)(E)(i)-(iii), which outlines guidance on how to determine when an alien present in lawful status as a lawful nonimmigrant accrues unlawful presence. The current Adjudicators Field Manual (“AFM”) states “status violation” and “unlawful presence” as two different concepts and does not confuse the two.</p> <p>AFM 40.9.2(a) in its entirety is devoted to distinguishing between unlawful status and unlawful presence. In fact, the AFM states: “To understand the operation of sections 212(a)(9)(B) and 212(a)(9)(C)(i)(I) of the Act, it is important to comprehend the difference between being in an unlawful</p>	

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	<p>immigration status and the accrual of unlawful presence ("period of stay not authorized"). Although these concepts are related (one must be present in an unlawful status in order to accrue unlawful presence), they are not the same."</p> <p>Amending AFM 40.9.2(b)(1)(E)(i)-(iii) would directly contradict the overall principle of distinction between unlawful presence and status violation under AFM 40.9.2(a). However, the memo does not touch on the relevance or application of AFM 40.9.2(a) moving forward and, as such, ensures that adjudicators will apply immigration laws in an unpredictable and inconsistent manner. This confusion would not live in just this particular set of subsections of the AFM and INA, but would also extend to many other parts of the present immigration law framework.</p> <p><i>4. The Proposed Policy Revision Will Contradict the Department of State's Guidance and Interpretations.</i></p> <p>The policy memo's guidance, if implemented, would also create irreconcilable inconsistencies between the Department of Homeland Security and the Department of State on the treatment of F, J, or M nonimmigrants who violate their status.</p> <p>The Department of State Cable on Revised 222(g) Guidance (March 1998) interprets INA 222(g) and related unlawful presence accumulation for nonimmigrants. The Department of State's position has not been revised since this cable and effectively agrees and is entirely consistent with the Department of Homeland Security's current policy for determining unlawful presence for nonimmigrants. The USCIS policy memo makes no mention of this direct conflict of interpretations and has no jurisdictional impact over the Department of State. Thus, the new policy will create a situation where DHS and DOS will have to enforce different interpretations on same fact patterns involving F, J, or M nonimmigrants. To enact a rule without considering other agencies' abilities to adjudicate matters based on the same statutes is to overreach beyond the limit of a single agency's rulemaking authority. An agency, of course, does have rulemaking authority, but should not knowingly affect other agencies' abilities to apply underlying statutes in a consistent manner without due consideration.</p> <p><i>5. The Proposed Memo Will Not Achieve the Goal It Sets Out to Achieve And Will Likely Burden the Already Overburdened Immigration System.</i></p> <p>The proposed policy memo claims "to reduce the number of overstays and to improve how USCIS implements the unlawful presence ground of inadmissibility under INA 212(a)(9)(B) and INA</p>	

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	<p>212(a)(9)(C)(i)(I)....” However, as the above analysis reveals, the proposed policy revision, if implemented, will create chaos, confusion, and uncertainty within USCIS and among agencies when implementing the unlawful presence ground of inadmissibility under INA 212(a)(9)(B) and INA 212(a)(9)(C)(i)(I) than to improve it. Rather than improving the system, it will likely burden the already burdened immigration system by turning unsuspecting students and exchange visitors from re-entering the U.S. for 3 or even 10 years without their knowledge and without providing them the opportunity to affirmatively mitigate such harsh consequence.</p> <p>The current immigration law framework already penalizes violations of status. To impose additional penalties that are typically reserved only for those who accrue unlawful presence would be both excessive and unnecessary. Violating status already bears the potential penalties of not being able to change, extend, or adjust status. According to INA 237(a)(1)(B), violating status can also lead to deportation since “any alien who is present in the United States in violation of this Act or any other law of the United States, or whose nonimmigrant visa (or other documentation authorizing admission into the United States as a nonimmigrant) has been revoked under section 221(i), is deportable.”</p> <p>These consequences give F, J, and M nonimmigrants sufficient incentives to avoid status violations and to lawfully pursue their educational or vocational pursuits. The current immigration law framework understands and recognizes the nuances between violating status and unlawful presence and ensures that each bears their own commensurate consequences.</p> <p>The USCIS Policy Memo as written will add no value to the current immigration system and will create more confusion and inconsistencies among agencies relying on statutes and guidance contained in the memo. Changes in immigration law policy should be taken with careful consideration and with in-depth understanding of its legal and practical ramifications as well as the interplay of the legal interpretation. As such, the proposed policy memo should be withdrawn and amended to better distinguish between violating status and unlawful presence to avoid the foreseeable inconsistent misapplication of immigration laws to F, J, and M nonimmigrants and retroactively triggering 3- and 10-year bar to entry to students or exchange visitors who may not know about their status violation and likely will not have the opportunity to affirmatively minimize the unlawful presence accrual period.</p> <p><i>6. Conclusion and Suggested Solution</i></p> <p>The Department of Homeland Security has a legitimate concern for students staying in the United States beyond the ending dates of their educational, exchange, and vocational programs. The solution to</p>	

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	such concerns should not be the narrow, short-sighted, and misguided reinterpretation of immigration laws proposed in the current policy memo. The issue should be addressed either through a more comprehensive consideration of all the agencies and statutory frameworks affected by the distinction between violating status and unlawful presence or, more realistically, through effective implementation of the SEVIS system and the institutions with responsibilities over these students or exchange visitors.	
Richard Porter [REDACTED]@[REDACTED]	<p>I am writing to express my opposition and concerns regarding the new policy memorandum, "Accrual of Unlawful Presence and F, J, and M Nonimmigrants," posted by U.S. Citizenship and Immigration Services (USCIS) on May 11, 2018.</p> <p>This action is of grave concern to the interests of the United States. Please see my <u>attached</u> signed Letter of Opposition and Concern. Thank you for your dutiful attention to this important matter.</p>	
Katharine Clair Primary Designated School Official International Student Advisor Trinity College [REDACTED] Hartford, CT Phone : [REDACTED] Email: [REDACTED]@[REDACTED]	<p>I am writing in regard to the recommendations made in "Policy Memoranda: Accrual of Unlawful Presence and F, J, and M Nonimmigrants (PM-602-1060)." These proposals represent a radical change in USCIS's interpretation and application of the regulations related to the accrual of unlawful presence by those in student (F nonimmigrant), exchange visitor (J nonimmigrant), or vocational student (M nonimmigrant) status and their dependents while in the United States.</p> <p>I work at Trinity College, and we have international students from more than 70 nations and faculty from across the globe. The international students and faculty on our campus bring unique experiences and perspectives to our classrooms, important ideas for discovery and innovation in research, and exciting leadership to our campus community.</p> <p>As the Primary Designated School Official at Trinity, I was alarmed to read these proposed changes. A great deal of my daily work consists of advising international students and scholars on how to maintain their visa status (and that of their dependents). This is something that the vast majority of international students deeply and sincerely want to do, and this means they need to remain aware of visa regulations while also balancing the demands all students experience along with their institution's requirements.</p> <p>There have been significant discussions amongst DSOs and AROs since this memorandum was released regarding how we will assist F/J/M visa holders in understanding these new policies without inadvertently engaging in the unauthorized practice of law. While changes in regulations are to be expected, these proposed changes are especially problematic because they are a departure from the long-standing, common sense interpretation of visa regulations that has been in place for over 20 years, and it creates a system where F/J/M visa holders may be found to have violated their visa status years after the violation supposedly occurred—something that is especially troubling since this memorandum</p>	

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	<p>attaches the possibility that this violation could result in individuals being barred from entering the U.S. for three years, ten years, or permanently.</p> <p>Although the announcement regarding these changes comes with sufficient notice for individuals who are currently out of status to take steps to remedy their visa status before they begin accruing unlawful presence, this new interpretation will cause a great deal of uncertainty for F/J/M visa holders moving forward. Here are some specific examples of some problems DSOs/AROs foresee with the implementation of this memoranda:</p> <ol style="list-style-type: none"> 1. Recent SEVP Portal Release: SEVP recently implemented a Portal through which F-1 students on post-completion optional practical training (OPT) or STEM OPT are allowed to report changes to their personal and/or employment information, but there have been issues with the system. Students are required to report these changes with ten days, but periodic problems with SEVIS and the Portal have resulted in incomplete information being available to students and instances when students have not been able to access the Portal. Additionally, some students have been confused about what information to enter and how to correctly enter it. All of this has resulted in incomplete and inaccurate data being reported to SEVIS through the Portal despite the best efforts of F-1 visa holders to report their information. Therefore, if USCIS relies on information from SEVIS (something the Policy memo mentions as a likely source of information for making decisions about violations of status), it is likely that there will be students judged to have violated their status based on this bad data. <p>While DSOs/AROs and others have been, historically, been able to help students resolve these data issues, the new interpretation of the regulations could mean that these students could be judged to have violated their status and could be accruing unlawful presence without realizing it.</p> <ol style="list-style-type: none"> 2. Changes to Regulations Causing Previously Approved Actions to Become Violations: The student and scholar visa system (SEVIS) is set up so that school officials bear a great deal of responsibility for assisting F/J/M visa holders to maintain their status. As DSOs/AROs, we do our best to communicate with our students when there are changes to visa regulations and regulatory interpretations. This is not an easy task—especially when changes to regulations or 	

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	<p>regulatory interpretations require that we tell students something that is the reverse of what we previously correctly advised them.</p> <p>In instances like the recent announcement restricting 3rd party employment for students on STEM OPT, it is very possible students will believe that they have done everything necessary to comply with the rules, only to apply to renew a visa or to change visa status in the future and be told that their actions (permissible when they started, but now not allowed due to changes in regulatory interpretations) were a violation of their status, and they have since accrued unlawful presence, barring them from changing visa status or re-entering the U.S.</p> <p>These are only two recent examples of actions that could result in international students accruing unlawful presence despite their attempts to follow the rules. We foresee many additional problems and unintended consequences that will result from such a large and dramatic shift in regulatory interpretation.</p> <p>In conclusion</p> <p>The USCIS press release for this memorandum quotes USCIS Director L. Francis Cissna as saying, "USCIS is dedicated to our mission of ensuring the integrity of the immigration system. F, J, and M nonimmigrants are admitted to the United States for a specific purpose, and when that purpose has ended, we expect them to depart, or to obtain another, lawful immigration status." This change, however, will not contribute meaningfully to that objective. Instead, it will likely result in confusion that will mean well-meaning international students and exchange visitors could be found to have accrued unlawful presence due to innocent mistakes or misunderstandings of changing regulations. Due to the strict bars that will be applied to these individuals due to these changes, these misunderstandings could have severe consequences.</p> <p>We are at a point in time where our international students can choose to study anywhere in the world. Many international students who enroll at U.S. institutions are the best of their classes at home, and they receive offers to attend institutions around the world. They choose to come to the United States because they have determined an institution is the best option for them to pursue their chosen field of study. While here, they excel in their classes, and they provide new perspectives and experiences to their classmates and the broader university community.</p>	

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	<p>If we want to ensure the students fulfill the “specific purpose” they receive their visa (obtaining an education at a U.S. institution), we must ensure our laws and regulations are structured and implemented in a fair and transparent manner. We must work to limit uncertainty so that students can focus on learning instead of tracking constantly changing regulations. This new policy has the opposite result.</p> <p>Recommendations</p> <p>I urge you to take these concerns into consideration and rather than making the proposed changes, consider the following recommendations suggested by NAFSA (Association of International Educators):</p> <ul style="list-style-type: none"> · Leave in place the current policy, which has served for over 20 years. Neither DHS nor legacy INS ever published regulations to implement this important area of law. If the agency wishes to implement such a drastic change to longstanding common interpretation of the law, it must be done through the notice and comment process. · Do not implement any policy change until implementation has been fully coordinated with the Department of State and other DHS units such as CBP and SEVP. · Exclude from the unlawful presence count any status violations that occurred under color of law, to avoid “gotcha” scenarios, where the student reasonably relied on the authorizations granted. For example, curricular practical training authorized in SEVIS that DHS later determines may have been improperly given, should not start the unlawful presence “clock” until DHS or an immigration judge makes a formal status determination. · Apply the change of status/extension of stay tolling rules to reinstatement applications. · Expand the sections describing examples where F, M, and J nonimmigrants “do not accrue unlawful presence in certain situations.” [draft Adjudicator’s Field Manual 40.9.2(b)(1)(E)(iii)]. 	
<p>Krittika Onsanit Director of International Student & Scholar Services Office of International Education [REDACTED] University of Richmond, VA [REDACTED] Tel. [REDACTED] Fax [REDACTED] [REDACTED]@[REDACTED]</p>	<p>I am writing to express my opposition and concerns regarding the new policy memorandum, “Accrual of Unlawful Presence and F, J, and M Nonimmigrants,” posted by U.S. Citizenship and Immigration Services (USCIS) on May 11, 2018.</p> <p>Briefly stated, the new memorandum will reverse more than 20 years of USCIS practice regarding the accrual of “unlawful presence,” a legal term defined under section 212(a)(9)(B)(ii) of the Immigration and Nationality Act (INA) by reference to an individual who “is present in the United States after expiration of the period of stay authorized by the Attorney General or is present in the United States without being admitted or paroled.” For nonimmigrant students and exchange visitors in the F, J, and M</p>	

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	<p>categories, legacy Immigration and Naturalization Service (INS) and USCIS have interpreted the statutory unlawful presence provisions to require notice to the individual of a status violation prior to the commencement of the unlawful presence clock. Such notice is provided in the context of the adjudication of a request for an immigration benefit by USCIS or a determination of a status violation by an immigration judge. The USCIS guidance articulating this position states, "It must be emphasized that the accrual of unlawful presence neither begins on the date that a status violation occurs, nor on the day on which removal proceedings are initiated." [1] This longstanding policy provides certainty in determining when unlawful presence begins to accrue, which the new policy does not.</p> <p>As described in the May 11, 2018 memorandum, USCIS will now deem unlawful presence to have started accruing as of the day after the date that a status violation occurs, thus removing the critical procedural safeguard of providing notice to affected individuals that may find themselves subject to the three- and ten-year bars to admissibility. This raises serious questions regarding fundamental fairness and due process and will have a significant negative impact on the student, vocational, and exchange visitor communities.</p> <p>In recognition of the fluidity of academic programs, F, M, and J nonimmigrants are not admitted to the U.S. until a date-certain. Instead, they are admitted for the "duration of their status," or "D/S," which means the student or exchange visitor can remain in the United States as long as they maintain their nonimmigrant status. This generally means the student must maintain a full course of study or remain in the exchange program, not engage in unauthorized employment or other unauthorized activities, and complete the academic or exchange program in a timely manner or obtain an extension. What the new memorandum fails to recognize is that the question as to whether an individual has violated their nonimmigrant status is complex and nuanced. Students and exchange visitors can accidentally and unknowingly violate their status by dropping slightly below a full course of study, or by engaging in innocent, but unauthorized activity. For example, F-1 students are permitted to engage in work at a "qualifying on-campus job" for up to 20 hours per week while school is in session. Therefore, an F-1 student who inadvertently exceeds the 20-hour limit by just a couple of hours has technically violated his or her student status. In addition, a Designated School Official may make a good faith error in advising a student by authorizing a reduced course load that should not have been approved, thereby leading the student to unknowingly and unintentionally violate their status. This unfairness is compounded when the status violation also serves as the "trigger" for the accrual of unlawful presence by dependents of students and exchange visitors.</p> <p>Other examples include:</p>	

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	<ul style="list-style-type: none"> Late notification to a DSO of the need to extend a program of study for unforeseen but legitimate academic or medical reasons <p>USCIS states that the purpose of the new guidance is to “reduce the number of overstays” and “to improve how USCIS implements the unlawful presence ground of inadmissibility.” Unfortunately, this approach accomplishes neither of these goals and will instead unfairly punish a potentially significant portion of the student and exchange visitor population, further erode foreign student enrollments at U.S. colleges and universities, and unnecessarily damage the U.S. economy. I urge USCIS to abandon this misguided directive and to maintain the unlawful presence guidance that has been in place for decades and ensures that fundamental fairness is a critical component in interpreting and implementing the unlawful presence statute.</p>	
Xiaojie (Marta) Meng Attorney at Law [REDACTED]@[REDACTED]	<p>On May 10, 2018, U.S. Citizenship and Immigration Services (“USCIS”) proposed a policy memo regarding the accrual of unlawful presence for F (student), J (exchange visitor), and M (vocational student) nonimmigrants. USCIS seeks public comment regarding the proposed changes until June 11, 2018.</p> <p>The proposed changes unfairly applies the law and triggers unlawful presence accrual for unsuspecting F, J, and M nonimmigrants who may not reasonably know about technical violations of status until years after the fact. Also, the proposed rule is inconsistent with existing statutes, regulations, and interpretations. The new policy change will create unintended legal and practical problems for all interested parties, including the U.S. government, nonimmigrants in these status, and the general public associated with these individuals. Thus, we respectfully and strongly urge USCIS to reconsider the implementation of the proposed policy and withdraw the proposed memo to take more time to thoroughly review it.</p> <p>1. Implementation Of The New Policy Will Create Uncertainty Over Accrual Of Unlawful Presence By Retroactively Triggering Unlawful Presence Period To Unsuspecting F, J, And M Nonimmigrants Who May Not Reasonably Be Aware Or Have Knowledge Of Their Status Violation Due To Technicalities And Will Not Have Reasonable Opportunity To Affirmatively Mitigate The Unlawful Presence Accrual Period.</p> <p>According to the proposed policy, an F, J, or M nonimmigrant will begin accruing unlawful presence on the day after the nonimmigrant fails to maintain his or her status. This is a significant departure from the current policy and could lead to extremely harsh consequence of 3- and 10-year bars to entry to</p>	

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	<p>students and exchange visitors who may only reasonably find out about the unlawful presence accrual until it is too late to make any change.</p> <p>Under the existing policy, an F, J, or M nonimmigrant starts accruing unlawful presence on the earliest of the following:</p> <ul style="list-style-type: none"> • The day after DHS denied the request for the immigration benefit, if DHS made a formal finding that the alien violated his or her nonimmigrant status while adjudicating a request for another immigration benefit; • The day after the Form I-94, Arrival/Departure Record expired, if the F, J, or M nonimmigrant was admitted for a date certain; or • The day after an immigration judge or, in certain cases, the Board of Immigration Appeals (BIA) ordered the alien excluded, deported, or removed (whether or not the decision is appealed). <p>Thus, an F, J, or M nonimmigrant will clearly be aware of the starting date of the accrual of unlawful presence and can make affirmative plans to comply with the law to avoid the potentially devastating consequences of unlawful presence.</p> <p>Under the proposed policy, effective August 9, 2018, an F, J, or M nonimmigrant starts accruing unlawful presence on the earliest of the following:</p> <ul style="list-style-type: none"> • The day after the F, J, or M nonimmigrant no longer pursues the course of study or the authorized activity, or the day after he or she engages in an unauthorized activity; • The day after completing the course of study or program (including any authorized practical training plus any authorized grace period, as outlined in 8 CFR 214.2); • The day after the Form I-94 expires, if the F, J, or M nonimmigrant was admitted for a date certain; or • The day after an immigration judge or, in certain cases the BIA28 orders the alien excluded, deported, or removed (whether or not the decision is appealed). <p>The changes proposed under the new policy can dramatically affect F, J, or M nonimmigrants by retroactively triggering unlawful presence to an unsuspecting student or exchange visitor who unknowingly engaged in a technical violation of their status. For example, regulations regarding employment for F students are complex, and many includes technical requirements that many students do not understand or are not even aware of. For instance, if the new rule goes into effect, an 18-year college freshman who, in good faith, volunteered for an off-campus internship without CPT could reasonably not find out about this potential violation of status until 3 or 4 years later after graduation</p>	

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	<p>during the H1B petition adjudication. Thus, due to the new policy change, this 21 or 22 year old person would unknowingly accrue 3 to 4 years of unlawful presence and will be barred from returning to the U.S. for 10 years.</p> <p>The new proposed policy unnecessarily creates uncertainty over the trigger date of unlawful presence and in the process severely punishes unknowing, unsuspecting students (many of whom are young people just starting their life) from returning to the U.S. for 3 or even 10 years. Moreover, as will be discussed below, the proposed policy change does not only revise AFM Chapter 40.9.2. The proposed revision will have ripple effects that create inconsistencies and contradictions with existing policy and interpretations of the law within DHS and with Department of State.</p> <p>2. The USCIS Policy Memo Confuses the Distinction Between Violating Status and Unlawful Presence, Which Has Been Consistently Recognized in INA 212(a) and 237(a) As Pivotal to the Application of Other Sections of the INA</p> <p>The proposed policy memo at hand fails to distinguish between violating status and unlawful presence when determining the applicability of the guidance and policies contained in the memo. Existing statutes clearly and separately distinguish between these two distinct legal concepts. To disregard the need to delineate the applicability of published guidance to each of these concepts is arbitrary and capricious and contradicts existing government policy and interpretations.</p> <p>INA 212(a)(9)(B)(ii) defines the construction of unlawful presence circumstances: "an alien is deemed to be unlawfully present in the United States if the alien is present in the United States after the expiration of the period of stay authorized by the Attorney General or is present in the United States without being admitted or paroled" (emphasis added). The statute explicitly reserves unlawful presence for circumstances in which status has expired and no other period of stay has been authorized by the Attorney General. INA 237(a)(1)(B) further defines unlawfully present aliens as a class of deportable aliens and as "[a]ny alien who is present in the United States in violation of this Act or any other law of the United States, or whose nonimmigrant visa (or other documentation authorizing admission into the United States as a nonimmigrant) has been revoked under section 221(j)" (emphasis added). The statutes explicitly define unlawful presence as an expiration, as opposed to a mere violation, of status; an unlawful entry into the United States; or an affirmative revocation of documentation authorizing admission into the United States. A revocation would entail, for example, a determination by an immigration judge or the Department of Homeland Security, and unlawful presence would trigger at the moment of such action.</p>	

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	<p>Notably, INA 237(a)(1)(C)(i) specifically distinguishes nonimmigrant status violators from unlawfully present aliens, and separately defines nonimmigrant status violators as “[a]ny alien who was admitted as a nonimmigrant and who has failed to maintain the nonimmigrant status in which the alien was admitted or to which it was changed under section 248, or to comply with the conditions of any such status.”</p> <p>Thus, INA clearly distinguishes between status violations and unlawful presence as separate legal concepts with different legal consequences. Congress has chosen to distinguish these legal concepts and impose different severities of repercussions, likely because unlawful presence involved affirmative intent to stay beyond authorized period of stay whereas status violation could involve negligence in understanding requirements of maintaining a status, which often includes various technical violations. Nonimmigrants should be reasonably aware of when their authorized stay expires, and staying in the United States beyond such expiration assumes a level of intent, whereas a violation of status may be the mere product of negligence. The new policy would blur the distinction of these two statutory concepts, which would effectively create inconsistencies among different sections of the INA statutes without a good policy rationale.</p> <p>The USCIS policy memo, at a minimum, guarantees the avoidable outcome of an inconsistent statutory framework for immigration law and will inevitably lead to unnecessary litigation over the applicability of certain sections of immigration law and existing policy manuals.</p> <p>3. The Proposed Policy Amends AFM 40.9.2(b)(1)(E)(i)-(iii), Which Will Cause Inconsistency with Other Sections of the Existing Adjudicators Field Manual</p> <p>The policy memo at hand primarily addresses AFM 40.9.2(b)(1)(E)(i)-(iii), which outlines guidance on how to determine when an alien present in lawful status as a lawful nonimmigrant accrues unlawful presence. The current Adjudicators Field Manual (“AFM”) states “status violation” and “unlawful presence” as two different concepts and does not confuse the two.</p> <p>AFM 40.9.2(a) in its entirety is devoted to distinguishing between unlawful status and unlawful presence. In fact, the AFM states: “To understand the operation of sections 212(a)(9)(B) and 212(a)(9)(C)(i)(I) of the Act, it is important to comprehend the difference between being in an unlawful immigration status and the accrual of unlawful presence (“period of stay not authorized”). Although these concepts are related (one must be present in an unlawful status in order to accrue unlawful</p>	

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	<p>presence), they are not the same.”</p> <p>Amending AFM 40.9.2(b)(1)(E)(i)-(iii) would directly contradict the overall principle of distinction between unlawful presence and status violation under AFM 40.9.2(a). However, the memo does not touch on the relevance or application of AFM 40.9.2(a) moving forward and, as such, ensures that adjudicators will apply immigration laws in an unpredictable and inconsistent manner. This confusion would not live in just this particular set of subsections of the AFM and INA, but would also extend to many other parts of the present immigration law framework.</p> <p>4. The Proposed Policy Revision Will Contradict the Department of State’s Guidance and Interpretations.</p> <p>The policy memo’s guidance, if implemented, would also create irreconcilable inconsistencies between the Department of Homeland Security and the Department of State on the treatment of F, J, or M nonimmigrants who violate their status.</p> <p>The Department of State Cable on Revised 222(g) Guidance (March 1998) interprets INA 222(g) and related unlawful presence accumulation for nonimmigrants. The Department of State’s position has not been revised since this cable and effectively agrees and is entirely consistent with the Department of Homeland Security’s current policy for determining unlawful presence for nonimmigrants. The USCIS policy memo makes no mention of this direct conflict of interpretations and has no jurisdictional impact over the Department of State. Thus, the new policy will create a situation where DHS and DOS will have to enforce different interpretations on same fact patterns involving F, J, or M nonimmigrants. To enact a rule without considering other agencies’ abilities to adjudicate matters based on the same statutes is to overreach beyond the limit of a single agency’s rulemaking authority. An agency, of course, does have rulemaking authority, but should not knowingly affect other agencies’ abilities to apply underlying statutes in a consistent manner without due consideration.</p> <p>5. The Proposed Memo Will Not Achieve the Goal It Sets Out to Achieve And Will Likely Burden the Already Overburdened Immigration System.</p> <p>The proposed policy memo claims “to reduce the number of overstays and to improve how USCIS implements the unlawful presence ground of inadmissibility under INA 212(a)(9)(B) and INA 212(a)(9)(C)(i)(I)....” However, as the above analysis reveals, the proposed policy revision, if implemented, will create chaos, confusion, and uncertainty within USCIS and among agencies when</p>	

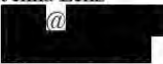
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	<p>implementing the unlawful presence ground of inadmissibility under INA 212(a)(9)(B) and INA 212(a)(9)(C)(i)(I) than to improve it. Rather than improving the system, it will likely burden the already burdened immigration system by turning unsuspecting students and exchange visitors from re-entering the U.S. for 3 or even 10 years without their knowledge and without providing them the opportunity to affirmatively mitigate such harsh consequence.</p> <p>The current immigration law framework already penalizes violations of status. To impose additional penalties that are typically reserved only for those who accrue unlawful presence would be both excessive and unnecessary. Violating status already bears the potential penalties of not being able to change, extend, or adjust status. According to INA 237(a)(1)(B), violating status can also lead to deportation since “any alien who is present in the United States in violation of this Act or any other law of the United States, or whose nonimmigrant visa (or other documentation authorizing admission into the United States as a nonimmigrant) has been revoked under section 221(i), is deportable.”</p> <p>These consequences give F, J, and M nonimmigrants sufficient incentives to avoid status violations and to lawfully pursue their educational or vocational pursuits. The current immigration law framework understands and recognizes the nuances between violating status and unlawful presence and ensures that each bears their own commensurate consequences.</p> <p>The USCIS Policy Memo as written will add no value to the current immigration system and will create more confusion and inconsistencies among agencies relying on statutes and guidance contained in the memo. Changes in immigration law policy should be taken with careful consideration and with in-depth understanding of its legal and practical ramifications as well as the interplay of the legal interpretation. As such, the proposed policy memo should be withdrawn and amended to better distinguish between violating status and unlawful presence to avoid the foreseeable inconsistent misapplication of immigration laws to F, J, and M nonimmigrants and retroactively triggering 3- and 10-year bar to entry to students or exchange visitors who may not know about their status violation and likely will not have the opportunity to affirmatively minimize the unlawful presence accrual period.</p> <p>6. Conclusion and Suggested Solution</p> <p>The Department of Homeland Security has a legitimate concern for students staying in the United States beyond the ending dates of their educational, exchange, and vocational programs. The solution to such concerns should not be the narrow, short-sighted, and misguided reinterpretation of immigration laws proposed in the current policy memo. The issue should be addressed either through a more</p>	

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<p>comprehensive consideration of all the agencies and statutory frameworks affected by the distinction between violating status and unlawful presence or, more realistically, through effective implementation of the SEVIS system and the institutions with responsibilities over these students or exchange visitors.</p> <p>Steve Miller [REDACTED] SEATTLE, WA [REDACTED] PHONE [REDACTED] FAX [REDACTED] [REDACTED]@[REDACTED]</p>	<p>As a long term former Trustee of Bellevue College in Washington State, I submit this response to the U.S. Citizenship and Immigration Services (USCIS) policy memorandum of May 10, 2018, "Accrual of Unlawful Presence and F, J, and M Nonimmigrants." Bellevue College is the third largest institution of higher education in Washington State. It is the largest in the 34 college community college system and the host to the largest number of foreign students. Our international students enrich our student experience and provide significant source of funds to allow our institution to provide high quality programs for all our students.</p> <p>I am puzzled by the USCIS and DHS and DOS sudden and complete hostility to foreign students in the United States. This memo fits in the line of hostility. It is a complete and unneeded departure from more than 20 years of policy guidance. It should be withdrawn It will harm students, their families, academic institution, state resources, and our community.</p> <p>The proposed change will punish students for minor oversights of which they may not be aware.</p> <p>It will damage Bellevue College by further solidifying the reputation as a country who does not want and is unfair to foreign students. I have known a number of students who were trapped by the complex rules and had minor issues with compliance. These were good and conscientious students. Taking away notice prior to the commencement of the unlawful presence clock makes no sense. The system including the College and Sevis makes errors. This would provide no basis for challenging and correcting errors that were not the students fault. Even if the student did make the mistake, the punishment is far out of proportion to the possible offense. Those affected would have little to no opportunity to dispute or remedy the stated violation. This raises serious questions regarding fundamental fairness and due process and will have a significant negative impact on the student, vocational, and exchange visitor communities.</p>	
<p>Andrea Bodine [REDACTED]@[REDACTED]</p>	<p>Please see <u>attached comments</u> from the Alliance for International Exchange regarding the U.S. Citizenship and Immigration Services policy memorandum dated May 10, 2018 concerning the "Accrual of Unlawful Presence and F, J, and M Nonimmigrants." Thank you.</p>	
<p>Jennifer S. Rodriguez Attorney at Law Rodriguez Immigration Law Firm, LLC</p>	<p>Please see <u>attached</u>.</p>	

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<p>Post Office Box [REDACTED] Madison, Connecticut [REDACTED] Tel [REDACTED] Fax [REDACTED] [REDACTED]@[REDACTED]</p>		
<p>Karin Senft [REDACTED]@[REDACTED].t</p>	<p>I am writing to express my opposition and concerns regarding the new policy memorandum, "Accrual of Unlawful Presence and F, J, and M Nonimmigrants," posted by U.S. Citizenship and Immigration Services (USCIS) on May 11, 2018.</p> <p>This action is of grave concern to the interests of the United States. Please see my attached signed Letter of Opposition and Concern. Thank you for your dutiful attention to this important matter.</p> <p><u>Comments attached.</u></p>	
<p>Noemi Masliah [REDACTED]@[REDACTED] New York, NY [REDACTED] Tel [REDACTED] Fax [REDACTED]</p>	<p>Our comment is attached.</p>	
<p>Katie Tudini [REDACTED]@[REDACTED] Buffalo, NY [REDACTED] Tel [REDACTED]</p>	<p>Dear USCIS,</p> <p>I am writing in regard to the recommendations made in "Policy Memoranda: Accrual of Unlawful Presence and F, J, and M Nonimmigrants (PM-602-1060)." These proposals represent a radical change in USCIS's interpretation and application of the regulations related to the accrual of unlawful presence by those in student (F nonimmigrant), exchange visitor (J nonimmigrant), or vocational student (M nonimmigrant) status and their dependents while in the United States.</p> <p>I work at the State University of New York at Buffalo, and we have international students from more than 115 nations and faculty from across the globe. The international students, researchers, staff and faculty on our campuses bring unique experiences and perspectives to our classrooms, important ideas for discovery and innovation to our research labs, and exciting leadership to our campus community.</p>	

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	<p>As a DSO (Designated School Official)/ARO (Alternate Responsible Officer), I was alarmed to read these proposed changes. A great deal of my daily work consists of advising international students on how to maintain their visa status (and that of their dependents). This is something that the vast majority of international students deeply and sincerely want to do, and this means they need to remain aware of visa regulations while also balancing the demands all students experience along with their institution's requirements.</p> <p>There have been significant discussions amongst DSOs and AROs since this memorandum was released regarding how we will assist F/J/M visa holders in understanding these new policies without inadvertently engaging in the unauthorized practice of law. While changes in regulations are to be expected, these proposed changes are especially problematic because they are a departure from the long-standing, common sense interpretation of visa regulations that has been in place for over 20 years, and it creates a system where F/J/M visa holders may be found to have violated their visa status years after the violation supposedly occurred—something that is especially troubling since this memorandum attaches the possibility that this violation could result in individuals being barred from entering the U.S. for three years, ten years, or permanently.</p> <p>Although the announcement regarding these changes comes with sufficient notice for individuals who are currently out of status to take steps to remedy their visa status before they begin accruing unlawful presence, this new interpretation will cause a great deal of uncertainty for F/J/M visa holders moving forward. Here are some specific examples of some problems DSOs/AROs foresee with the implementation of this memoranda:</p> <ol style="list-style-type: none"> 1. Recent SEVP Portal Release: SEVP recently implemented a Portal through which F-1 students on post-completion optional practical training (OPT) or STEM OPT are allowed to report changes to their personal and/or employment information, but there have been issues with the system. Students are required to report these changes with ten days, but periodic problems with SEVIS and the Portal have resulted in incomplete information being available to students and instances when students have not been able to access the Portal. Additionally, some students have been confused about what information to enter and how to correctly enter it. All of this has resulted in incomplete and inaccurate data being reported to SEVIS through the Portal despite the best efforts of F-1 visa holders to report their information. Therefore, if USCIS relies on information from SEVIS (something the Policy memo mentions as a likely source of information for making decisions about violations of status), it is likely that there will be students judged to have violated their status based on this bad data. 	

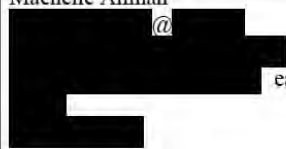
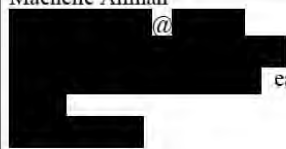
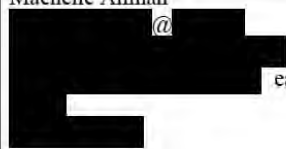


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	<p>2. Changes to Regulations Causing Previously Approved Actions to Become Violations: The student and scholar visa system (SEVIS) is set up so that school officials bear a great deal of responsibility for assisting F/J/M visa holders to maintain their status. As DSOs/AROs, we do our best communicate with our students when there are changes to visa regulations and regulatory interpretations. This is not an easy task—especially when changes to regulations or regulatory interpretations require that we tell students something that is the reverse of what we previously correctly advised them.</p> <p>In instances like the recent announcement restricting 3rd party employment for students on STEM OPT, it is very possible students will believe that they have done everything necessary to comply with the rules, only to apply to renew a visa or to change visa status in the future and be told that their actions (permissible when they started, but now not allowed due to changes in regulatory interpretations) were a violation of their status, and they have since accrued unlawful presence, barring them from changing visa status or re-entering the U.S.</p> <p>These are only two recent examples of actions that could result in international students accruing unlawful presence despite their attempts to follow the rules. We foresee many additional problems and unintended consequences that will result from such a large and dramatic shift in regulatory interpretation.</p> <p>In conclusion The USCIS press release for this memorandum quotes USCIS Director L. Francis Cissna as saying, “USCIS is dedicated to our mission of ensuring the integrity of the immigration system. F, J, and M nonimmigrants are admitted to the United States for a specific purpose, and when that purpose has ended, we expect them to depart, or to obtain another, lawful immigration status.” This change, however, will not contribute meaningfully to that objective. Instead, it will likely result in confusion that will mean well-meaning international students and exchange visitors could be found to have accrued unlawful presence due to innocent mistakes or misunderstandings of changing regulations. Due to the strict bars that will be applied to these individuals due to these changes, these misunderstandings could have severe consequences.</p> <p>We are at a point in time where our international students can choose to study anywhere in the world. Many international students who enroll at U.S. institutions are the best of their classes at home, and they receive offers to attend institutions around the world. They choose to come to the United States because they have determined an institution is the best option for them to pursue their chosen field of</p>	

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	<p>study. While here, they excel in their classes, and they provide new perspectives and experiences to their classmates and the broader university community.</p> <p>If we want to ensure the students fulfill the “specific purpose” they receive their visa (obtaining an education at a U.S. institution), we must ensure our laws and regulations are structured and implemented in a fair and transparent manner. We must work to limit uncertainty so that students can focus on learning instead of tracking constantly changing regulations. This new policy has the opposite result.</p> <p>Recommendations</p> <p>I urge you to take these concerns into consideration and rather than making the proposed changes, consider the following recommendations suggested by NAFSA (Association of International Educators):</p> <ul style="list-style-type: none"> • Leave in place the current policy, which has served for over 20 years. Neither DHS nor legacy INS ever published regulations to implement this important area of law. If the agency wishes to implement such a drastic change to longstanding common interpretation of the law, it must be done through the notice and comment process. • Do not implement any policy change until implementation has been fully coordinated with the Department of State and other DHS units such as CBP and SEVP. • Exclude from the unlawful presence count any status violations that occurred under color of law, to avoid “gotcha” scenarios, where the student reasonably relied on the authorizations granted. For example, curricular practical training authorized in SEVIS that DHS later determines may have been improperly given, should not start the unlawful presence “clock” until DHS or an immigration judge makes a formal status determination. • Apply the change of status/extension of stay tolling rules to reinstatement applications. • Expand the sections describing examples where F, M, and J nonimmigrants “do not accrue unlawful presence in certain situations.” [draft Adjudicator’s Field Manual 40.9.2(b)(1)(E)(iii)]. <p>Sincerely,</p>	
Jenna Lenz  University at Buffalo	<p>Dear USCIS,</p> <p>I am writing in regard to the recommendations made in “Policy Memoranda: Accrual of Unlawful Presence and F, J, and M Nonimmigrants (PM-602-1060).” These proposals represent a radical change</p>	

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Buffalo, New York [REDACTED] Tel. [REDACTED]	<p>in USCIS's interpretation and application of the regulations related to the accrual of unlawful presence by those in student (F nonimmigrant), exchange visitor (J nonimmigrant), or vocational student (M nonimmigrant) status and their dependents while in the United States.</p> <p>I work at the State University of New York at Buffalo, and we have international students from more than 100 nations and faculty from across the globe. The international students, researchers, staff and faculty on our campuses bring unique experiences and perspectives to our classrooms, important ideas for discovery and innovation to our research labs, and exciting leadership to our campus community.</p> <p>As a DSO (Designated School Official), I was alarmed to read these proposed changes. A great deal of my daily work consists of advising international students on how to maintain their visa status (and that of their dependents). This is something that the vast majority of international students deeply and sincerely want to do, and this means they need to remain aware of visa regulations while also balancing the demands all students experience along with their institution's requirements.</p> <p>There have been significant discussions amongst DSOs and AROs since this memorandum was released regarding how we will assist F/J/M visa holders in understanding these new policies without inadvertently engaging in the unauthorized practice of law. While changes in regulations are to be expected, these proposed changes are especially problematic because they are a departure from the long-standing, common sense interpretation of visa regulations that has been in place for over 20 years, and it creates a system where F/J/M visa holders may be found to have violated their visa status years after the violation supposedly occurred—something that is especially troubling since this memorandum attaches the possibility that this violation could result in individuals being barred from entering the U.S. for three years, ten years, or permanently.</p> <p>Although the announcement regarding these changes comes with sufficient notice for individuals who are currently out of status to take steps to remedy their visa status before they begin accruing unlawful presence, this new interpretation will cause a great deal of uncertainty for F/J/M visa holders moving forward. Here are some specific examples of some problems DSOs/AROs foresee with the implementation of this memoranda:</p> <ol style="list-style-type: none"> 1. Recent SEVP Portal Release: SEVP recently implemented a Portal through which F-1 students on post-completion optional practical training (OPT) or STEM OPT are allowed to report changes to their personal and/or employment information, but there have been issues with the system. Students are required to report these changes with ten days, but periodic problems with SEVIS and the Portal have 	

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	<p>resulted in incomplete information being available to students and instances when students have not been able to access the Portal. Additionally, some students have been confused about what information to enter and how to correctly enter it. All of this has resulted in incomplete and inaccurate data being reported to SEVIS through the Portal despite the best efforts of F-1 visa holders to report their information. Therefore, if USCIS relies on information from SEVIS (something the Policy memo mentions as a likely source of information for making decisions about violations of status), it is likely that there will be students judged to have violated their status based on this bad data.</p> <p>2. Changes to Regulations Causing Previously Approved Actions to Become Violations: The student and scholar visa system (SEVIS) is set up so that school officials bear a great deal of responsibility for assisting F/J/M visa holders to maintain their status. As DSOs/AROs, we do our best communicate with our students when there are changes to visa regulations and regulatory interpretations. This is not an easy task—especially when changes to regulations or regulatory interpretations require that we tell students something that is the reverse of what we previously correctly advised them.</p> <p>In instances like the recent announcement restricting 3rd party employment for students on STEM OPT, it is very possible students will believe that they have done everything necessary to comply with the rules, only to apply to renew a visa or to change visa status in the future and be told that their actions (permissible when they started, but now not allowed due to changes in regulatory interpretations) were a violation of their status, and they have since accrued unlawful presence, barring them from changing visa status or re-entering the U.S.</p> <p>These are only two recent examples of actions that could result in international students accruing unlawful presence despite their attempts to follow the rules. We foresee many additional problems and unintended consequences that will result from such a large and dramatic shift in regulatory interpretation.</p> <p>In conclusion The USCIS press release for this memorandum quotes USCIS Director L. Francis Cissna as saying, “USCIS is dedicated to our mission of ensuring the integrity of the immigration system. F, J, and M nonimmigrants are admitted to the United States for a specific purpose, and when that purpose has ended, we expect them to depart, or to obtain another, lawful immigration status.” This change, however, will not contribute meaningfully to that objective. Instead, it will likely result in confusion that will mean well-meaning international students and exchange visitors could be found to have accrued unlawful presence due to innocent mistakes or misunderstandings of changing regulations. Due</p>	

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	<p>to the strict bars that will be applied to these individuals due to these changes, these misunderstandings could have severe consequences.</p> <p>We are at a point in time where our international students can choose to study anywhere in the world. Many international students who enroll at U.S. institutions are the best of their classes at home, and they receive offers to attend institutions around the world. They choose to come to the United States because they have determined an institution is the best option for them to pursue their chosen field of study. While here, they excel in their classes, and they provide new perspectives and experiences to their classmates and the broader university community.</p> <p>If we want to ensure the students fulfill the “specific purpose” they receive their visa (obtaining an education at a U.S. institution), we must ensure our laws and regulations are structured and implemented in a fair and transparent manner. We must work to limit uncertainty so that students can focus on learning instead of tracking constantly changing regulations. This new policy has the opposite result.</p> <p>Recommendations</p> <p>I urge you to take these concerns into consideration and rather than making the proposed changes, consider the following recommendations suggested by NAFSA (Association of International Educators):</p> <ul style="list-style-type: none"> • Leave in place the current policy, which has served for over 20 years. Neither DHS nor legacy INS ever published regulations to implement this important area of law. If the agency wishes to implement such a drastic change to longstanding common interpretation of the law, it must be done through the notice and comment process. • Do not implement any policy change until implementation has been fully coordinated with the Department of State and other DHS units such as CBP and SEVP. • Exclude from the unlawful presence count any status violations that occurred under color of law, to avoid “gotcha” scenarios, where the student reasonably relied on the authorizations granted. For example, curricular practical training authorized in SEVIS that DHS later determines may have been improperly given, should not start the unlawful presence “clock” until DHS or an immigration judge makes a formal status determination. • Apply the change of status/extension of stay tolling rules to reinstatement applications. • Expand the sections describing examples where F, M, and J nonimmigrants “do not accrue unlawful presence in certain situations.” [draft Adjudicator’s Field Manual 40.9.2(b)(1)(E)(iii)]. 	

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	Sincerely,	
Machelle Allman  @   eattle, WA	<p>The proposed memo unnecessarily conflates violation of status with unlawful presence and should be withdrawn.</p> <p>The current policy, which has served for over 20 years, is that unlawful presence does not accrue until a formal determination has been made by an immigration judge or government agency. This policy is fair and allows for a student to rectify a small violation through reinstatement to student status with a Form I-539 or through new entry. However, the proposed memo indicates that unlawful presence could be retroactive, and a student filing for reinstatement would have no idea if they are accruing unlawful presence or not because they wouldn't know if the reinstatement will be approved or denied.</p> <p>Similarly, as explained by NAFSA: A failure to account for inconsistency among immigration documents, electronic records, and actions and events in the real world could lead to an adverse determination on status or benefit eligibility. Whether the data in documents and electronic records is being interpreted correctly, taking into account all applicable law and policy, is also a primary concern. Immigration law is complicated, and both compliance and enforcement is a very technical matter that requires training and expertise. Because of this complexity, an alien might not even know he or she is "out of status" until informed by the government.</p> <p>... Unlawful presence should only trigger when there is clear notice of remaining beyond an expiration date of authorized stay in the United States and not when there is a contestable allegation of violation of status.</p> <p>As the PDSO of a major research university, I take our data integrity, our student advising, and regulatory compliance very seriously. However, equating DSO actions at a school with the determination of an immigration judge, as this policy memo would do in effect, raises serious questions about fundamental fairness and due process.</p> <p>USCIS states that the purpose of the new guidance is to "reduce the number of overstay," however students are given D/S, "duration of status" rather than date specific periods in the US. Their programs and their stay in the US are by definition fluid. In addition, the information gathered by federal agencies about exits from the US is incomplete. There is no evidence that implementing the policy memo would accomplish the stated goal.</p>	
Claire Ding  @ 	The proposed changes unfairly applies the law and triggers unlawful presence accrual for unsuspecting F, J, and M nonimmigrants who may not reasonably know about technical violations of status until	

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	<p>years after the fact. Also, the proposed rule is inconsistent with existing statutes, regulations, and interpretations. The new policy change will create unintended legal and practical problems for all interested parties, including the U.S. government, nonimmigrants in these status, and the general public associated with these individuals. Thus, we respectfully and strongly urge USCIS to reconsider the implementation of the proposed policy and withdraw the proposed memo to take more time to thoroughly review it.</p> <p>1. Implementation Of The New Policy Will Create Uncertainty Over Accrual Of Unlawful Presence By Retroactively Triggering Unlawful Presence Period To Unsuspecting F, J, And M Nonimmigrants Who May Not Reasonably Be Aware Or Have Knowledge Of Their Status Violation Due To Technicalities And Will Not Have Reasonable Opportunity To Affirmatively Mitigate The Unlawful Presence Accrual Period.</p> <p>According to the proposed policy, an F, J, or M nonimmigrant will begin accruing unlawful presence on the day after the nonimmigrant fails to maintain his or her status. This is a significant departure from the current policy and could lead to extremely harsh consequence of 3- and 10-year bars to entry to students and exchange visitors who may only reasonably find out about the unlawful presence accrual until it is too late to make any change.</p> <p>Under the existing policy, an F, J, or M nonimmigrant starts accruing unlawful presence on the earliest of the following:</p> <ul style="list-style-type: none"> • The day after DHS denied the request for the immigration benefit, if DHS made a formal finding that the alien violated his or her nonimmigrant status while adjudicating a request for another immigration benefit; • The day after the Form I-94, Arrival/Departure Record expired, if the F, J, or M nonimmigrant was admitted for a date certain; or • The day after an immigration judge or, in certain cases, the Board of Immigration Appeals (BIA) ordered the alien excluded, deported, or removed (whether or not the decision is appealed). <p>Thus, an F, J, or M nonimmigrant will clearly be aware of the starting date of the accrual of unlawful presence and can make affirmative plans to comply with the law to avoid the potentially devastating consequences of unlawful presence.</p> <p>Under the proposed policy, effective August 9, 2018, an F, J, or M nonimmigrant starts accruing unlawful presence on the earliest of the following:</p> <ul style="list-style-type: none"> • The day after the F, J, or M nonimmigrant no longer pursues the course of study or the authorized activity, or the day after he or she engages in an unauthorized activity; • The day after completing the course of study or program (including any authorized practical training plus any authorized grace period, as outlined in 8 CFR 214.2); • The day after the Form I-94 expires, if the F, J, or M nonimmigrant was admitted for a date 	

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	<p>certain; or</p> <ul style="list-style-type: none"> The day after an immigration judge or, in certain cases the BIA orders the alien excluded, deported, or removed (whether or not the decision is appealed). <p>The changes proposed under the new policy can dramatically affect F, J, or M nonimmigrants by retroactively triggering unlawful presence to an unsuspecting student or exchange visitor who unknowingly engaged in a technical violation of their status. For example, regulations regarding employment for F students are complex, and many includes technical requirements that many students do not understand or are not even aware of. For instance, if the new rule goes into effect, an 18-year college freshman who, in good faith, volunteered for an off-campus internship without CPT could reasonably not find out about this potential violation of status until 3 or 4 years later after graduation during the H1B petition adjudication. Thus, due to the new policy change, this 21 or 22 year old person would unknowingly accrue 3 to 4 years of unlawful presence and will be barred from returning to the U.S. for 10 years.</p> <p>The new proposed policy unnecessarily creates uncertainty over the trigger date of unlawful presence and in the process severely punishes unknowing, unsuspecting students (many of whom are young people just starting their life) from returning to the U.S. for 3 or even 10 years.</p> <p>Moreover, as will be discussed below, the proposed policy change does not only revise AFM Chapter 40.9.2. The proposed revision will have ripple effects that create inconsistencies and contradictions with existing policy and interpretations of the law within DHS and with Department of State.</p> <p>2. The USCIS Policy Memo Confuses the Distinction Between Violating Status and Unlawful Presence, Which Has Been Consistently Recognized in INA 212(a) and 237(a) As Pivotal to the Application of Other Sections of the INA</p> <p>The proposed policy memo at hand fails to distinguish between violating status and unlawful presence when determining the applicability of the guidance and policies contained in the memo. Existing statutes clearly and separately distinguish between these two distinct legal concepts. To disregard the need to delineate the applicability of published guidance to each of these concepts is arbitrary and capricious and contradicts existing government policy and interpretations.</p> <p>INA 212(a)(9)(B)(ii) defines the construction of unlawful presence circumstances: "an alien is deemed to be unlawfully present in the United States if the alien is present in the United States after the expiration of the period of stay authorized by the Attorney General or is present in the United States without being admitted or paroled" (emphasis added). The statute explicitly reserves unlawful presence for circumstances in which status has expired and no other period of stay has been authorized by the Attorney General. INA 237(a)(1)(B) further defines unlawfully present aliens as a class of deportable aliens and as "[a]ny alien who is present in the United States in violation of this Act or any other law of</p>	

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	<p>the United States, or whose nonimmigrant visa (or other documentation authorizing admission into the United States as a nonimmigrant) has been revoked under section 221(i)" (emphasis added). The statutes explicitly define unlawful presence as an expiration, as opposed to a mere violation, of status; an unlawful entry into the United States; or an affirmative revocation of documentation authorizing admission into the United States. A revocation would entail, for example, a determination by an immigration judge or the Department of Homeland Security, and unlawful presence would trigger at the moment of such action.</p> <p>Notably, INA 237(a)(1)(C)(i) specifically distinguishes nonimmigrant status violators from unlawfully present aliens, and separately defines nonimmigrant status violators as "[a]ny alien who was admitted as a nonimmigrant and who has failed to maintain the nonimmigrant status in which the alien was admitted or to which it was changed under section 248, or to comply with the conditions of any such status."</p> <p>Thus, INA clearly distinguishes between status violations and unlawful presence as separate legal concepts with different legal consequences. Congress has chosen to distinguish these legal concepts and impose different severities of repercussions, likely because unlawful presence involved affirmative intent to stay beyond authorized period of stay whereas status violation could involve negligence in understanding requirements of maintaining a status, which often includes various technical violations. Nonimmigrants should be reasonably aware of when their authorized stay expires, and staying in the United States beyond such expiration assumes a level of intent, whereas a violation of status may be the mere product of negligence. The new policy would blur the distinction of these two statutory concepts, which would effectively create inconsistencies among different sections of the INA statutes without a good policy rationale.</p> <p>The USCIS policy memo, at a minimum, guarantees the avoidable outcome of an inconsistent statutory framework for immigration law and will inevitably lead to unnecessary litigation over the applicability of certain sections of immigration law and existing policy manuals.</p> <p>3. The Proposed Policy Amends AFM 40.9.2(b)(1)(E)(i)-(iii), Which Will Cause Inconsistency with Other Sections of the Existing Adjudicators Field Manual</p> <p>The policy memo at hand primarily addresses AFM 40.9.2(b)(1)(E)(i)-(iii), which outlines guidance on how to determine when an alien present in lawful status as a lawful nonimmigrant accrues unlawful presence. The current Adjudicators Field Manual ("AFM") states "status violation" and "unlawful presence" as two different concepts and does not confuse the two.</p> <p>AFM 40.9.2(a) in its entirety is devoted to distinguishing between unlawful status and unlawful presence. In fact, the AFM states: "To understand the operation of sections 212(a)(9)(B) and 212(a)(9)(C)(i)(I) of the Act, it is important to comprehend the difference between being in an unlawful</p>	

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	<p>immigration status and the accrual of unlawful presence ("period of stay not authorized"). Although these concepts are related (one must be present in an unlawful status in order to accrue unlawful presence), they are not the same."</p> <p>Amending AFM 40.9.2(b)(1)(E)(i)-(iii) would directly contradict the overall principle of distinction between unlawful presence and status violation under AFM 40.9.2(a). However, the memo does not touch on the relevance or application of AFM 40.9.2(a) moving forward and, as such, ensures that adjudicators will apply immigration laws in an unpredictable and inconsistent manner. This confusion would not live in just this particular set of subsections of the AFM and INA, but would also extend to many other parts of the present immigration law framework.</p> <p>4. The Proposed Policy Revision Will Contradict the Department of State's Guidance and Interpretations.</p> <p>The policy memo's guidance, if implemented, would also create irreconcilable inconsistencies between the Department of Homeland Security and the Department of State on the treatment of F, J, or M nonimmigrants who violate their status.</p> <p>The Department of State Cable on Revised 222(g) Guidance (March 1998) interprets INA 222(g) and related unlawful presence accumulation for nonimmigrants. The Department of State's position has not been revised since this cable and effectively agrees and is entirely consistent with the Department of Homeland Security's current policy for determining unlawful presence for nonimmigrants. The USCIS policy memo makes no mention of this direct conflict of interpretations and has no jurisdictional impact over the Department of State. Thus, the new policy will create a situation where DHS and DOS will have to enforce different interpretations on same fact patterns involving F, J, or M nonimmigrants. To enact a rule without considering other agencies' abilities to adjudicate matters based on the same statutes is to overreach beyond the limit of a single agency's rulemaking authority. An agency, of course, does have rulemaking authority, but should not knowingly affect other agencies' abilities to apply underlying statutes in a consistent manner without due consideration.</p> <p>5. The Proposed Memo Will Not Achieve the Goal It Sets Out to Achieve And Will Likely Burden the Already Overburdened Immigration System.</p> <p>The proposed policy memo claims "to reduce the number of overstays and to improve how USCIS implements the unlawful presence ground of inadmissibility under INA 212(a)(9)(B) and INA 212(a)(9)(C)(i)(I)...." However, as the above analysis reveals, the proposed policy revision, if implemented, will create chaos, confusion, and uncertainty within USCIS and among agencies when implementing the unlawful presence ground of inadmissibility under INA 212(a)(9)(B) and INA 212(a)(9)(C)(i)(I) than to improve it. Rather than improving the system, it will likely burden the already</p>	

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	<p>burdened immigration system by turning unsuspecting students and exchange visitors from re-entering the U.S. for 3 or even 10 years without their knowledge and without providing them the opportunity to affirmatively mitigate such harsh consequence.</p> <p>The current immigration law framework already penalizes violations of status. To impose additional penalties that are typically reserved only for those who accrue unlawful presence would be both excessive and unnecessary. Violating status already bears the potential penalties of not being able to change, extend, or adjust status. According to INA 237(a)(1)(B), violating status can also lead to deportation since "any alien who is present in the United States in violation of this Act or any other law of the United States, or whose nonimmigrant visa (or other documentation authorizing admission into the United States as a nonimmigrant) has been revoked under section 221(i), is deportable."</p> <p>These consequences give F, J, and M nonimmigrants sufficient incentives to avoid status violations and to lawfully pursue their educational or vocational pursuits. The current immigration law framework understands and recognizes the nuances between violating status and unlawful presence and ensures that each bears their own commensurate consequences.</p> <p>The USCIS Policy Memo as written will add no value to the current immigration system and will create more confusion and inconsistencies among agencies relying on statutes and guidance contained in the memo. Changes in immigration law policy should be taken with careful consideration and with in-depth understanding of its legal and practical ramifications as well as the interplay of the legal interpretation. As such, the proposed policy memo should be withdrawn and amended to better distinguish between violating status and unlawful presence to avoid the foreseeable inconsistent misapplication of immigration laws to F, J, and M nonimmigrants and retroactively triggering 3- and 10-year bar to entry to students or exchange visitors who may not know about their status violation and likely will not have the opportunity to affirmatively minimize the unlawful presence accrual period.</p> <p>6. Conclusion and Suggested Solution</p> <p>The Department of Homeland Security has a legitimate concern for students staying in the United States beyond the ending dates of their educational, exchange, and vocational programs. The solution to such concerns should not be the narrow, short-sighted, and misguided reinterpretation of immigration laws proposed in the current policy memo. The issue should be addressed either through a more comprehensive consideration of all the agencies and statutory frameworks affected by the distinction between violating status and unlawful presence or, more realistically, through effective implementation of the SEVIS system and the institutions with responsibilities over these students or exchange visitors.</p>	
Kara Y. Lasota [REDACTED]@[REDACTED]	Dear USCIS,	

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	<p>I am writing in regard to the recommendations made in "Policy Memoranda: Accrual of Unlawful Presence and F, J, and M Nonimmigrants (PM-602-1060)." These proposals represent an deeply disturbing and drastic departure from USCIS's previous interpretation and application of the regulations related to the accrual of unlawful presence by those in student (F nonimmigrant), exchange visitor (J nonimmigrant), or vocational student (M nonimmigrant) status and their dependents while in the United States.</p> <p>I work at a regional comprehensive university in Washington State, and we have international students and faculty from around the world. Our international students and faculty enrich the campus community in uncountable ways. In particular, international faculty, exchange visitors, and F-1 students on our campuses bring valuable insight and perspective to the classroom – for many of our domestic students, who will enter a globalized workforce, this may be their first introduction to someone from outside of Washington, let alone the United States.</p> <p>Our students and exchange visitors go back to their home countries and become citizen diplomats on our behalf. Their positive experiences in the US make changes in their home countries for the better.</p> <p>As a Designated School Official and Alternate Responsible Officer, I am deeply disturbed by the proposed changes. The vast majority of the students and scholars that I advise on status maintenance are. My daily work includes a great deal of time advising international students and scholars on how to maintain their visa status (and that of their dependents). This is something that the vast majority of international students and scholars are anxious to follow the rules of their visa status, and must balance their intense academic activities with tracking an already difficult set of rules and regulations to comply with the rules. F- and J- status students and exchange visitors are already the mostly intensely tracked foreign nationals in the United States.</p> <p>There have been significant discussions amongst DSOs and AROs since this memorandum was released regarding how we will assist F/J/M visa holders in understanding these new policies without inadvertently engaging in the unauthorized practice of law. While changes in regulations are to be expected, these proposed changes are especially problematic because they are a departure from the long-standing, common sense interpretation of visa regulations that has been in place for over 20 years, and it creates a system where F/J/M visa holders may be found to have violated their visa status years after the violation supposedly occurred—something that is especially troubling since this memorandum attaches the possibility that this violation could result in individuals being barred from entering the U.S. for three years, ten years, or permanently. Of particular concern to many DSOs and AROs is the</p>	

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	<p>possibility that an inadvertent technical error on our part or failure to document something adequately could retroactively impact our former students years in the future. Worse, that an action or piece of advice from someone over whom we have no control, will create that situation. Academic advisors, for instance, may counsel a student to drop a class (and in some cases, drop it for them) to preserve the student's GPA – the student follows the advice and is out of status without ever realizing it until months later when grades come out and a DSO is explaining they have violated their status, accruing unlawful presence all along they way.</p> <p>This new interpretation will cause a great deal of uncertainty for F/J/M visa holders moving forward. Here are some specific examples of some problems DSOs/AROs foresee with the implementation of this memoranda:</p> <p>Recent SEVP Portal Release: SEVP recently implemented a Portal through which F-1 students on post-completion optional practical training (OPT) or STEM OPT are allowed to report changes to their personal and/or employment information, but there have been issues with the system. Students are required to report these changes with ten days, but periodic problems with SEVIS and the Portal have resulted in incomplete information being available to students and instances when students have not been able to access the Portal. Additionally, some students have been confused about what information to enter and how to correctly enter it. All of this has resulted in incomplete and inaccurate data being reported to SEVIS through the Portal despite the best efforts of F-1 visa holders to report their information. Therefore, if USCIS relies on information from SEVIS (something the Policy memo mentions as a likely source of information for making decisions about violations of status), it is likely that there will be students judged to have violated their status based on this bad data.</p> <p>While DSOs/AROs and others have been, historically, been able to help students resolve these data issues, the new interpretation of the regulations could mean that these student could be judged to have violated their status and could be accruing unlawful presence without realizing it.</p> <p>Changes to Regulations Causing Previously Approved Actions to Become Violations: The student and scholar visa system (SEVIS) is set up so that school officials bear a great deal of responsibility for assisting F/J/M visa holders to maintain their status. As DSOs/AROs, we do our best communicate with our students when there are changes to visa regulations and regulatory interpretations. This is not an easy task—especially when changes to regulations or regulatory interpretations require that we tell students something that is the reverse of what we previously correctly advised them.</p> <p>In instances like the recent announcement restricting 3rd party employment for students on STEM</p>	

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	<p>OPT, it is very possible students will believe that they have done everything necessary to comply with the rules, only to apply to renew a visa or to change visa status in the future and be told that their actions (permissible when they started, but now not allowed due to changes in regulatory interpretations) were a violation of their status, and they have since accrued unlawful presence, barring them from changing visa status or re-entering the U.S. Similarly, a change in USCIS interpretation of permissible amounts of Curricular and Optional Practical Training at the same level, is resulting in many Requests for Further Evidence for students applying for benefits recently – they were, however following the guidance available from USCIS during their CPT and OPT periods, but might then be considered to have violated their status years before, essentially creating an automatic bar of 10 years for any change of interpretation or mistake discovered in retrospect.</p> <p>This is only a small sampling of actions that could result in international students accruing unlawful presence despite making every attempt to follow the rules. It is easy for any DSO or ARO to imagine the landslide of additional problems and unintended consequences that will result from such a large and dramatic shift in regulatory interpretation, resulting in significant additional burdens on US government agencies, educational institutions, and the students and scholars themselves, as well as a loss of substantial revenue to the United States from the students and exchange visitors who come here to study.</p> <p>USCIS Director L. Francis Cissna is quoted in the press release for this memorandum that “USCIS is dedicated to our mission of ensuring the integrity of the immigration system. F, J, and M nonimmigrants are admitted to the United States for a specific purpose, and when that purpose has ended, we expect them to depart, or to obtain another, lawful immigration status.” Rather than contributing to this goal, this proposed change is far more likely to create confusion that will mean well-meaning international students and exchange visitors could be found to have accrued unlawful presence due to innocent mistakes or misunderstandings of changing regulations --or to the mistakes of others, through no fault of their own. Due to the strict bars that will be applied to these individuals due to these changes, these misunderstandings could have severe consequences.</p> <p>Many international students who enroll at U.S. institutions are the best of their classes at home, and they receive offers to attend institutions around the world. They choose to come to the United States because they have determined an institution is the best option for them to pursue their chosen field of study. While here, they excel in their classes, provide new perspectives and experiences to their classmates and the broader university community, and they metaphorically and literally enrich the</p>	

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	<p>surrounding communities.</p> <p>If we want to ensure the students fulfill the “specific purpose” for which they receive visa, it is incumbent on us to ensure our laws and regulations are clear, and are structured and implemented in a fair and transparent manner, and that the consequences of an inadvertent violation are in proportion to that violation. Students and scholars should be focused on learning and teaching instead of tracking constantly changing regulations, and trying to second guess the next interpretation of a given action. DSOs and AROs should be able to confidently guide students and scholars in complying with immigration regulations based on established practice and precedent or thoughtful and meaningful changes to regulation and practice. This new policy has the opposite result.</p> <p>I respectfully urge you to carefully scrutinize the potential impacts – both proximal and distal— of these changes: DSOs and AROs who have been in the field for a number of years are used to seeing the law of unintended consequences come into play routinely in our jobs, and we can see how vast and problematical the impacts of this change would be.</p> <p>I ask you to consider the following recommendations suggested by NAFSA (Association of International Educators):</p> <ul style="list-style-type: none"> • Leave in place the current policy, which has served for over 20 years. Neither DHS nor legacy INS ever published regulations to implement this important area of law. If the agency wishes to implement such a drastic change to longstanding common interpretation of the law, it must be done through the notice and comment process. • Do not implement any policy change until implementation has been fully coordinated with the Department of State and other DHS units such as CBP and SEVP. • Exclude from the unlawful presence count any status violations that occurred under color of law, to avoid “gotcha” scenarios, where the student reasonably relied on the authorizations granted. For example, curricular practical training authorized in SEVIS that DHS later determines may have been improperly given, should not start the unlawful presence “clock” until DHS or an immigration judge makes a formal status determination. • Apply the change of status/extension of stay tolling rules to reinstatement applications. • Expand the sections describing examples where F, M, and J nonimmigrants “do not accrue unlawful presence in certain situations.” [draft Adjudicator’s Field Manual 40.9.2(b)(1)(E)(iii)]. <p>Thank you for taking the time to consider these matters.</p>	

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<p>Emily Neumann [REDACTED]@[REDACTED]</p>	<p>Dear Madam or Sir:</p> <p>I am writing to express my opposition and concerns regarding the new policy memorandum, "Accrual of Unlawful Presence and F, J, and M Nonimmigrants," posted by U.S. Citizenship and Immigration Services (USCIS) on May 11, 2018.</p> <p>Briefly stated, the new memorandum will reverse more than 20 years of USCIS practice regarding the accrual of "unlawful presence," a legal term defined under section 212(a)(9)(B)(ii) of the Immigration and Nationality Act (INA) by reference to an individual who "is present in the United States after expiration of the period of stay authorized by the Attorney General or is present in the United States without being admitted or paroled." For nonimmigrant students and exchange visitors in the F, J, and M categories, legacy Immigration and Naturalization Service (INS) and USCIS have interpreted the statutory unlawful presence provisions to require notice to the individual of a status violation prior to the commencement of the unlawful presence clock. Such notice is provided in the context of the adjudication of a request for an immigration benefit by USCIS or a determination of a status violation by an immigration judge. The USCIS guidance articulating this position states, "It must be emphasized that the accrual of unlawful presence neither begins on the date that a status violation occurs, nor on the day on which removal proceedings are initiated." [1] This longstanding policy provides certainty in determining when unlawful presence begins to accrue, which the new policy does not.</p> <p>As described in the May 11, 2018 memorandum, USCIS will now deem unlawful presence to have started accruing as of the day after the date that a status violation occurs, thus removing the critical procedural safeguard of providing notice to affected individuals that may find themselves subject to the three- and ten-year bars to admissibility. This raises serious questions regarding fundamental fairness and due process and will have a significant negative impact on the student, vocational, and exchange visitor communities.</p> <p>In recognition of the fluidity of academic programs, F, M, and J nonimmigrants are not admitted to the U.S. until a date-certain. Instead, they are admitted for the "duration of their status," or "D/S," which means the student or exchange visitor can remain in the United States as long as they maintain their nonimmigrant status. This generally means the student must maintain a full course of study or remain in the exchange program, not engage in unauthorized employment or other unauthorized activities, and complete the academic or exchange program in a timely manner or obtain an extension. What the new memorandum fails to recognize is that the question as to whether an individual has violated their nonimmigrant status is complex and nuanced. Students and exchange visitors can accidentally and</p>	

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	<p>unknowingly violate their status by dropping slightly below a full course of study, or by engaging in innocent, but unauthorized activity. For example:</p> <ul style="list-style-type: none"> F-1 students are permitted to engage in work at a “qualifying on-campus job” for up to 20 hours per week while school is in session. Therefore, an F-1 student who inadvertently exceeds the 20-hour limit by just a couple of hours has technically violated his or her student status. A Designated School Official may make a good faith error in advising a student by authorizing a reduced course load that should not have been approved, thereby leading the student to unknowingly and unintentionally violate their status. This unfairness is compounded when the status violation also serves as the “trigger” for the accrual of unlawful presence by dependents of students and exchange visitors. USCIS has changed its interpretation without any advance warning to students regarding the ability of staffing and temporary agencies to comply with the employer’s training obligation under the STEM OPT program. F-1 students have been approved for STEM OPT by both Designated School Officials and USCIS for positions that appear to no longer comply. It would be exceedingly unfair to charge these students, who were approved by USCIS for this employment, with a status violation and add insult to injury by further triggering the accrual of unlawful presence. USCIS has also changed its interpretation without any advance warning to students regarding the ability of students to be authorized for curricular practical training following completion of optional practical training at the same degree level. Although a Designated School Official approves the student for curricular practical training, USCIS has later determined that the training was not authorized and therefore a violation of status. The student would be unduly burdened if this new memorandum causes the student to also accrue unlawful presence for time when the employment was thought to be authorized. The SEVIS system is not foolproof. It has caused students’ records to be terminated improperly and can be very time-consuming to correct. This memorandum could easily cause students needing SEVIS data fixes to accrue unlawful presence to due government error and inaction. <p>USCIS states that the purpose of the new guidance is to “reduce the number of overstays” and “to improve how USCIS implements the unlawful presence ground of inadmissibility.” Unfortunately, this approach accomplishes neither of these goals and will instead unfairly punish a potentially significant</p>	

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	<p>portion of the student and exchange visitor population, further erode foreign student enrollments at U.S. colleges and universities, and unnecessarily damage the U.S. economy. I urge USCIS to abandon this misguided directive and to maintain the unlawful presence guidance that has been in place for decades and ensures that fundamental fairness is a critical component in interpreting and implementing the unlawful presence statute.</p>	
<p>Helen Leonard [REDACTED]@[REDACTED] Brooklyn, NY phone [REDACTED]</p>	<p>Dear Director Cissna:</p> <p>As an international student advisor with an institution of 17000 international students, I was dismayed to read the Policy Memorandum PM-602-10660 on "Accrual of Unlawful Presence and F, J, and M Nonimmigrants. This memo is a radical departure from more than 20 years of policy guidance. We request that USCIS withdraw the memo and implement the recommendations below.</p> <p>The proposed change is operationally complex and may lead to wrongly identifying a large number of foreign students and exchange visitors as failing to maintain lawful status, thus unfairly subjecting them to the 3-year, 10-year, or permanent bars to re-entry to the United States.</p> <p>This memo eliminates the long-held distinction between violating immigration status and being unlawfully present in the United States. The concept of "unlawful presence" with various "clocks," "tolling" provisions, and "bars" has to this point been the purview of immigration law specialists and law school classes. Immigration policy is incredibly complex with dire consequences for violation. Foreign students, scholars, and exchange visitors are not immigration attorneys or policy professionals and it is unfair to treat them as such. Unlawful presence should only trigger when there is clear notice of remaining beyond an expiration date of authorized stay in the United States and not when there is a contestable allegation of violation of status.</p> <p>This proposal is yet another policy which makes the United States less attractive to talented international students, scholars, and exchange visitors and undoubtedly will encourage them to look elsewhere to do their groundbreaking research and build diplomatic ties. Foreign students, scholars, and exchange visitors are here to learn, and they make America safer by becoming the nation's best ambassadors and allies. By treating them all as criminals for minor or technical violations, we will be making America less safe and a less desirable place to study. This is contrary to our nation's values as a welcoming nation of immigrants.</p> <p>The current policy has held up for more than twenty years because it provides bright-line dates</p>	

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	<p>established in government systems, which give adequate notice to students and exchange visitors and their schools and exchange programs. The expiration date on a Form I-94 is one such clearly established date. If an individual stays beyond that date, he or she begins to accumulate days of unlawful presence. Many status violations do not present such a bright line, particularly because there is overlap between different types of "status." For example, Visa status (the validity period of the nonimmigrant visa in your passport) SEVIS status (the draft, initial, active, completed, deactivated, or terminated status of a nonimmigrant's electronic record in the Student and Exchange Visitor Information System database) Nonimmigrant status (abiding by the duration and other conditions of the nonimmigrant category in which an alien is admitted to the United States by DHS) DHS now proposes to directly equate a violation of nonimmigrant status accorded under INA 214, with the start of counting days of unlawful presence under INA 212(a)(9)(B). While an alien who violates his or her nonimmigrant status is certainly removable, the policy in place for the last 20 years that distinguishes between status violations and unlawful presence makes sense for purposes of applying INA 212(a)(9)(B), from both legal and public policy viewpoints. A clear government determination, whether it is the expiration date on a nonimmigrant's Form I-94, or a formal finding of a status violation made in the course of a DHS benefits determination or by an immigration judge, serves as a fair and clear warning to an alien that the clock is ticking, and he or she must take action to leave the United States or otherwise cure the status deficiency. An alien who persists after such fair notice, must face the possibility of not being able to return to the United States for either 3 or 10 years.</p> <p>Because the INA 212(a)(9)(B) penalties are so severe, we must also weigh the fairness of the policies enforcing that law. Long USCIS adjudication times, for example, may lead to someone becoming subject to the unlawful presence penalties in any case that is ultimately denied. For example, consider a student who registers for fewer classes than she should have one semester, which leads her school to terminate her SEVIS record. In good faith, the student registers for a full course of study the next semester, and applies in good faith to USCIS to reinstate her student status. It is not uncommon for a USCIS Service Center to take six months or longer to adjudicate an application for reinstatement to student status. Under current USCIS policy, if USCIS ultimately denies her reinstatement the student would start counting unlawful presence as of the date of the denial, which gives sufficient time to either make arrangements to leave the country, or possibly to ask USCIS to reconsider its decision. In the proposed policy, virtually all students whose reinstatement applications are denied would find themselves subject to at least the 3-year bar, merely because USCIS takes so long to adjudicate applications for reinstatement. In addition, a student or exchange visitor might not even know that he or she was in violation of status until DHS makes a formal determination of that. If the unlawful presence "clock" is seen to start at some distant time in the past in such cases, any window for departing the</p>	

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	<p>country will have passed.</p> <p>Recommendations:</p> <p>I strongly feel that USCIS should leave in place the current policy, which has served for over 20 years. Neither DHS nor legacy INS ever published regulations to implement this important area of law. If the agency wishes to implement such a drastic change to longstanding common interpretation of the law, it must be done through the notice and comment process, and not attempt to circumvent that practice by creating a policy memorandum.</p> <p>Exclude from the unlawful presence count any status violations that occurred under color of law, to avoid "gotcha" scenarios, where the student reasonably relied on the authorizations granted. For example, curricular practical training authorized in SEVIS that DHS later determines may have been improperly given, should not start the unlawful presence "clock" until DHS or an immigration judge makes a formal status determination.</p> <p>Apply the change of status/extension of stay tolling rules to reinstatement applications.</p> <p>It is particularly troublesome that lengthy processing times for a change of status applications presently taking 8-10 months, may contribute to an individual falling out of status and needing to file bridge applications to a status they do not even want, due to incredibly slow processing times by USCIS.</p> <p>Thank you for the opportunity to comment on this Policy.</p>	
<p>YC Lin [REDACTED]@[REDACTED]</p>	<p>Dear officer,</p> <p>I've been a lawful non-immigrant work at U.S working for Amazon as a software engineer. Having gone through the process of visa transitioning process, I've kept myself updated with new policy change from USCIS website. I want to comment on a specific session of the Memoranda to propose some adjustment/change.</p> <p>Below is the session I want to comment on the following session: Individuals in F, J, or M status who fail to maintain their status on or after Aug. 9, 2018, will start accruing unlawful presence on the earliest of any of the following:</p> <ul style="list-style-type: none"> • The day after they no longer pursue the course of study or the authorized activity, or the day 	

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	<p>after they engage in an unauthorized activity;</p> <p>Here are my arguments: The notion of 'authorized activity' vs 'unauthorized activity' is very vague. Who can decide if some activities are authorized and some are not? Contradictory to the current regulations in this Memoranda that "The day after DHS denied the request for an immigration benefit, if DHS made a formal finding that the individual violated his or her nonimmigrant status while adjudicating a request for another immigration benefit". I want to know specifically that:</p> <ol style="list-style-type: none"> 1. Who decide authorized vs. unauthorized? Is 'authorized' equivalent to 'legal'? 2. Is the decision maker specified? Or it can be anyone from USCIS? 3. Why is 'DHS made a formal finding' removed from the new policy? Does it mean that the USCIS does NOT need to "made a formal finding" to decide what is a violation and what is not? How do you prevent human error without a formal finding ? <p>I want to give a very simple example to illustrate the potential consequence of executing this policy. Example: An F-1 Sophomore year college student inadvertently did a part-time job as a dishwasher for a school party organized by U.S students. The U.S students paid \$50 to this F-1 student, because of his dishwashing work. To me, he is not authorized to do so. So technically, because of the retrogression policy, he's been out of status the date he did the dishwashing. So 3 years after he graduates, he transitions his Visa to H1b. However, at this time, the U.S students at the party made a report that this F-1 student received \$50 3 years ago.</p> <p>My question for this case is:</p> <ol style="list-style-type: none"> 1. Who will verify this claim? You don't trust this report or, you do? The current regulation clearly said you need to 'make a formal finding'. But the upcoming policy removes this statement. My question is, what if the U.S friends make a falsified report? What's your decision making process? And, do you have some specific Legal guidelines to follow to make your investigation and decision? 2. Let's assume that you have made the 'formal finding' that this student did a part-time work and received \$50 in his sophomore year. According to the policy, he has been out of status for 3 years. Should he be deported immediately and banned from coming to U.S in 3 ~ 10 years? <p>And here is my logic to argue against this specific piece in the Memoranda. Either you answer 'Yes, he's banned' or 'No, he should be fine' is wrong in the decision making process. Arbitrating a case like this should not be done by personal judgment. To prevent misjudgment from happening is to resort to laws. And to resolve to laws, there must be specific authorities that understand how to follow the clear-</p>	

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	<p>defined regulations and procedures.</p> <p>My opinion to this Memoranda is that removing 'made a final finding' from 'DHS' will expose the arbitration process to human errors, such as political views, personal emotions and prejudice etc. Vaguely stating 'authorized activities' vs 'unauthorized activities' does not yield clear enough guideline to follow, which will result in similar consequences of having more human errors.</p> <p>I propose the USCIS make a more precise, more accountable and more objective change of statement to this Memoranda.</p> <p>Best regards,</p>	
<p>Angie Zhang [REDACTED]@[REDACTED]</p>	<p>USCIS,</p> <p>On May 10, 2018, U.S. Citizenship and Immigration Services ("USCIS") proposed a policy memo regarding the accrual of unlawful presence for F, J and M nonimmigrants. As an F-1 student, I feel the policy in this memo impairs my rights a lot and probably causes more unexpected legal issues on my visa status.</p> <p>As a international student in STEM field, I may not reasonably be aware or have knowledge of my status violation due to technicalities. According the proposed rules in the memo, an F, J, or M nonimmigrant will begin accruing unlawful presence on the day after the nonimmigrant fails to maintain his or her status. Under this policy, we would not have reasonable opportunity to affirmatively mitigate the unlawful presence accrual period, because it is too late to make any change when we find out about the unlawful presence accrual.</p> <p>We do not intend to violate any laws in U.S.. Under the existing policy, an F, J, or M nonimmigrant can clearly be aware of the starting date of the accrual of unlawful presence and can make affirmative plans to comply with the law. Current policy gives us a clear guide and reasonable time to avoid the potentially devastating consequences of unlawful presence. However, the new proposed policy unnecessarily creates uncertainty over the trigger date of unlawful presence. This may severely punish unknowing, unsuspecting students from returning to the U.S. for 3 or even 10 years.</p> <p>It is unfair to punish F, J, or M nonimmigrants who may not know about our status violation. In case there is unexpected or unknown status violation, We need the opportunity to affirmatively minimize the unlawful presence accrual period. .</p>	

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	I strongly disagree the proposed policy on Accrual of Unlawful Presence and F, J, and M Nonimmigrants. I hope USICS does not ignore or deprive our reasonable and basic rights.	
Baby Rani Kora [REDACTED]@[REDACTED]	<p>With the proposed USCIS New Policy Memo on F-1 Students and when Unlawful presence kicks in for Status violations, students living & working in US with CPT work permit.</p> <p>Because of the Policy many students, also employees who have taken CPT there lifes becomes meaning less. It would become a big mistake if the policy is implemented it may lead to loss of their career. It also leads to graphs falling down both economically and financially. Which may lead to a big Relationship loss with other coutries.</p> <p>In both ways the USA, people who are in CPT will face a great Loss. Hope You Understand and I wish the Policy shouldn't be implemented.</p> <p>Thanks</p>	
Marissa Hill-Dongre, J.D. [REDACTED]@[REDACTED]	<p>Dear USCIS -</p> <p>I am writing in regard to the recommendations made in "Policy Memoranda: Accrual of Unlawful Presence and F, J, and M Nonimmigrants (PM-602-1060)." These proposals represent a radical change in USCIS's interpretation and application of the regulations related to the accrual of unlawful presence by those in student (F nonimmigrant), exchange visitor (J nonimmigrant), or vocational student (M nonimmigrant) status and their dependents while in the United States.</p> <p>I work at the University of Minnesota, and we have international students from more than 135 nations and faculty from across the globe. The international students, researchers, staff and faculty on our campuses bring unique experiences and perspectives to our classrooms, important ideas for discovery and innovation to our research labs, and exciting leadership to our campus community.</p> <p>I work with international students and scholars and direct the University's Immigration Response Team. Over the last few weeks I have met with a number of University of staff who work directly with international students and scholars to hear their questions and concerns about this proposed change in interpretation. Across the board, DSOs(Designated School Official) and AROs (Alternate Responsible Officer) are alarmed to read these proposed changes. A great deal of their daily work consists of advising international students and scholars on how to maintain their visa status (and that of their</p>	

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	<p>dependents). This is something that the vast majority of international students deeply and sincerely want to do, and this means they need to remain aware of visa regulations while also balancing the demands all students experience along with their institution's requirements.</p> <p>There have been significant discussions amongst DSOs and AROs since this memorandum was released regarding how we will assist F/J/M visa holders in understanding these new policies without inadvertently engaging in the unauthorized practice of law. While changes in regulations are to be expected, these proposed changes are especially problematic because they are a departure from the long-standing, common sense interpretation of visa regulations that has been in place for over 20 years, and it creates a system where F/J/M visa holders may be found to have violated their visa status years after the violation supposedly occurred—something that is especially troubling since this memorandum attaches the possibility that this violation could result in individuals being barred from entering the U.S. for three years, ten years, or permanently.</p> <p>Although the announcement regarding these changes comes with sufficient notice for individuals who are currently out of status to take steps to remedy their visa status before they begin accruing unlawful presence, this new interpretation will cause a great deal of uncertainty for F/J/M visa holders moving forward. Here are some specific examples of some problems DSOs/AROs foresee with the implementation of this memoranda:</p> <p>1. Recent SEVP Portal Release: SEVP recently implemented a Portal through which F-1 students on post-completion optional practical training (OPT) or STEM OPT are allowed to report changes to their personal and/or employment information, but there have been issues with the system. Students are required to report these changes with ten days, but periodic problems with SEVIS and the Portal have resulted in incomplete information being available to students and instances when students have not been able to access the Portal. Additionally, some students have been confused about what information to enter and how to correctly enter it. All of this has resulted in incomplete and inaccurate data being reported to SEVIS through the Portal despite the best efforts of F-1 visa holders to report their information. Therefore, if USCIS relies on information from SEVIS (something the Policy memo mentions as a likely source of information for making decisions about violations of status), it is likely that there will be students judged to have violated their status based on this bad data.</p> <p>While DSOs/AROs and others have been, historically, been able to help students resolve these data issues, the new interpretation of the regulations could mean that these student could be judged to have violated their status and could be be accruing unlawful presence without realizing it.</p>	

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	<p>2. Changes to Regulations Causing Previously Approved Actions to Become Violations: The student and scholar visa system (SEVIS) is set up so that school officials bear a great deal of responsibility for assisting F/J/M visa holders to maintain their status. As DSOs/AROs, we do our best communicate with our students when there are changes to visa regulations and regulatory interpretations. This is not an easy task—especially when changes to regulations or regulatory interpretations require that we tell students something that is the reverse of what we previously correctly advised them.</p> <p>In instances like the recent announcement restricting 3rd party employment for students on STEM OPT, it is very possible students will believe that they have done everything necessary to comply with the rules, only to apply to renew a visa or to change visa status in the future and be told that their actions (permissible when they started, but now not allowed due to changes in regulatory interpretations) were a violation of their status, and they have since accrued unlawful presence, barring them from changing visa status or re-entering the U.S.</p> <p>These are only two recent examples of actions that could result in international students accruing unlawful presence despite their attempts to follow the rules. We foresee many additional problems and unintended consequences that will result from such a large and dramatic shift in regulatory interpretation.</p> <p>In conclusion</p> <p>The USCIS press release for this memorandum quotes USCIS Director L. Francis Cissna as saying, “USCIS is dedicated to our mission of ensuring the integrity of the immigration system. F, J, and M nonimmigrants are admitted to the United States for a specific purpose, and when that purpose has ended, we expect them to depart, or to obtain another, lawful immigration status.” This change, however, will not contribute meaningfully to that objective. Instead, it will likely result in confusion that will mean well-meaning international students and exchange visitors could be found to have accrued unlawful presence due to innocent mistakes or misunderstandings of changing regulations. Due to the strict bars that will be applied to these individuals due to these changes, these misunderstandings could have severe consequences.</p> <p>We are at a point in time where our international students can choose to study anywhere in the world. Many international students who enroll at U.S. institutions are the best of their classes at home, and</p>	

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	<p>they receive offers to attend institutions around the world. They choose to come to the United States because they have determined an institution is the best option for them to pursue their chosen field of study. While here, they excel in their classes, and they provide new perspectives and experiences to their classmates and the broader university community.</p> <p>If we want to ensure the students fulfill the “specific purpose” they receive their visa (obtaining an education at a U.S. institution), we must ensure our laws and regulations are structured and implemented in a fair and transparent manner. We must work to limit uncertainty so that students can focus on learning instead of tracking constantly changing regulations. This new policy has the opposite result.</p> <p>Recommendations</p> <p>I urge you to take these concerns into consideration and rather than making the proposed changes, consider the following recommendations suggested by NAFSA (Association of International Educators):</p> <ul style="list-style-type: none"> • Leave in place the current policy, which has served for over 20 years. Neither DHS nor legacy INS ever published regulations to implement this important area of law. If the agency wishes to implement such a drastic change to longstanding common interpretation of the law, it must be done through the notice and comment process. • Do not implement any policy change until implementation has been fully coordinated with the Department of State and other DHS units such as CBP and SEVP. • Exclude from the unlawful presence count any status violations that occurred under color of law, to avoid “gotcha” scenarios, where the student reasonably relied on the authorizations granted. For example, curricular practical training authorized in SEVIS that DHS later determines may have been improperly given, should not start the unlawful presence “clock” until DHS or an immigration judge makes a formal status determination. • Apply the change of status/extension of stay tolling rules to reinstatement applications. • Expand the sections describing examples where F, M, and J nonimmigrants “do not accrue unlawful presence in certain situations.” [draft Adjudicator’s Field Manual 40.9.2(b)(1)(E)(iii)]. <p>Sincerely,</p>	
Srikanth [REDACTED]@[REDACTED]	Dear Director:	

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	<p>I would like to submit the following comments in response to the USCIS Proposed Policy Memo "Accrual of Unlawful Presence and F, J, and M Nonimmigrants" (PM-602-1060), posted on May 11, 2018.</p> <p>I am an F-1 international student who has recently graduated from [university] and am working based on Optional Practical Training (OPT). My employer has recently petitioned for my H-1B work visa during the cap-subject application period in April.</p> <p>My concern with the proposed memorandum is that its new calculation of accrual of unlawful presence may jeopardize my ability to obtain a nonimmigrant visa from a consulate. By essentially equating unlawful presence with failure to maintain proper status, the policy memo puts an undue burden on F-1 students and penalizes them retroactively. The new calculation would render F-1 students unlawfully present dating back to the day after a failure to maintain F-1 status began, rather than from the day of an adverse decision by DHS or an immigration judge.</p> <p>This is an undue burden and disproportionate penalty on us F-1 students because the policies for maintaining proper F-1 status have not always been made uniformly clear to us, or even to our DSOs. As an F-1 student, I rely heavily on my school's DSO in order to maintain valid status, as he or she issues my I-20s, endorses the I-20s for work authorization, and updates my records in the SEVIS system. F-1 students may have engaged in certain employment activities with the full endorsement of their school's DSO, and issuance of an Employment Authorization Document by DHS, only to discover later that the initial grant of work authorization was improper.</p> <p>These inconsistencies are sometimes due to DSO error but are also due to DHS interpretations that may change without warning and get applied retroactively, to our detriment. Updates to USCIS interpretation of employer-employee relationships, for example, may retroactively invalidate an arrangement that I worked under during my OPT training period. The proposed policy memo would result in accrual of unlawful presence retroactively, during a period of time when USCIS policy was different or unclear.</p> <p>Furthermore, the extensive processing times for H-1B change of status petitions, combined with the suspension of premium processing for cap-subject H-1B applications, puts students like me at risk of having accrued unlawful presence for more than six months by the time USCIS has adjudicated my H-1B application and made a determination on whether I have maintained proper status. The extensive service center backlogs, suspension of premium processing, and sudden change in unlawful presence</p>	

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	<p>interpretation are all beyond the control of F-1 students. Under this memo, I may be determined to have unknowingly accrued several months of unlawful presence, and a possible 3- or 10-year bar against re-entry, without having possessed the intent to do so, and without any means to remedy my situation once I become aware of it.</p> <p>The accrual of unlawful presence calculation is currently linked to an adverse determination by DHS or an immigration judge (or by the expiration of an I-94) because such a determination actively puts the student on notice that he or she was no longer authorized to stay and/or work in the U.S., and should depart immediately. The calculation under this proposed memo will put students like me in a position to have possibly accrued several months of unlawful presence unknowingly. It is further exacerbated by the fact that their accrual of unlawful presence may have been endorsed by my school's DSO, the main immigration-related official that I have any contact with and on whom I rely. The application of the proposed memo will unfairly penalize students like me who have acted in good faith, who timely applied for work authorization, and acted according to the policies in effect at the time. It will affect our ability to apply for any other nonimmigrant visa in the U.S., as well as prevent us from applying for a visa at a consulate abroad due to the inadmissibility bar.</p> <p>It is not my intention to overstay my visa or to be unlawfully present in the U.S. I have come to study in the U.S. in order to gain a higher education in America's universities, and to supplement my education through hands-on work experience. My intention is to do so by complying with the relevant immigration regulations and policies. However, when those policies are not always clear, and my studies or work experience are being endorsed by the school's DSO, I feel I should not be penalized retroactively when I have acted in good faith and am informed later that there was a problem with my maintenance of status. I would advocate for the continuation of the current calculation of accrual of unlawful presence for F-1 individuals, which would allow for clear notice to the F-1 student concerning a failure to maintain proper status, a clear start date for the accrual of unlawful presence, and application of a re-entry bar only after remaining in the U.S. for a significant period beyond that notice. This calculation is equitable and avoids disproportionately penalizing students who have acted in good faith, and would allow us an opportunity to remedy our visa status once we become aware of the problem by being able to depart the U.S. as soon as we become aware that unlawful presence has begun to accrue.</p> <p>I urge against the implementation of this proposed policy memo. Thank you for your consideration, time, and support in this matter.</p>	

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<p>Pallavi Deshpande [REDACTED]@ [REDACTED]</p>	<p>Sincerely, Hello,</p> <p>I would like to request a change in the following portion of the memo [in Italics below]. Ideally there should be some of a grace period [preferably of 60 days] provided at least to 'F' category who are typically the international students. It does not seem practical to exit the country the next very day. There will be some formalities such as closing the bank account/s, college account and formalities, seeing off friends and family, packing and arranging for return travel, making arrangements in the Home country etc.. or the individual might even be unwell and not in a position to travel, so the grace period will allow the individual to brace himself/herself to travel back.</p> <p>Request you to please consider adding a grace period for all the situations listed below.</p> <p>An F, J, or M nonimmigrant begins accruing unlawful presence, due to a failure to maintain his or her status10 on or after August 9, 2018, on the earliest of any of the following:</p> <ul style="list-style-type: none"> • The day after the F, J, or M nonimmigrant no longer pursues the course of study or the authorized activity, or the day after he or she engages in an unauthorized activity; • The day after completing the course of study or program (including any authorized practical training plus any authorized grace period, as outlined in 8 CFR 214.2); • The day after the Form I-94 expires, if the F, J, or M nonimmigrant was admitted for a date certain; or • The day after an immigration judge or, in certain cases, the BIA11 orders the alien excluded, deported, or removed (whether or not the decision is appealed). 	
<p>Mailley [REDACTED]@ [REDACTED]</p>	<p>Greetings,</p> <p>This entire document is counter productive in bringing the best and brightest International Students to the United States.</p> <p>Proposed changes do not allow for the inefficiencies and incompetence of US Government worker involved in immigration and scholarly pursuits, administrative mistakes on the part of students and University employees,nor honest mistakes of quality students, to the detriment of the students being addressed by these proposed changes.</p> <p>In the documents text below, students have no grace period for not maintaining a full course load. During my three years as an USAF ROTC Instructor at Michigan State University it was a common occurrence for students to fail to meet course load requirements do to lack of class offerings, class</p>	

STAKEHOLDER/ ORGANIZATION	STAKEHOLDER COMMENTS	ORIGINATING OFFICE'S RESOLUTIONS
	<p>scheduling conflicts, and miscellaneous other reasons.</p> <p>I recommend providing consideration for delaying counting days in cases of school administrative errors, personal hardships, other circumstances beyond the student's control.</p> <p>Some of the greatest talent in America comes from International Students, their families and their relationships they bring to America. I imagine our medical, science, technology, IT and engineering prowess will suffer a great setback if these changes are enacted.</p> <p>Thank you for your consideration, Jeff</p> <ul style="list-style-type: none"> • • During any additional grace period as permitted under 8 CFR 214.2(f)(5)(iv) to prepare for departure: <ul style="list-style-type: none"> o 60 days following completion of a course of study and any authorized practical training; o 15 days if the designated school official (DSO) authorized the withdrawal from classes (SEVIS termination reason: authorized early withdrawal); or o No grace period if the F-1 nonimmigrant failed to maintain a full course of study without the approval of the DSO or otherwise failed to maintain status). 	
SATYASAI RAGHAVA KRISHNA AKKAPEDDI [REDACTED]@[REDACTED]	<p>Dear Director:</p> <p>I would like to submit the following comments in response to the USCIS Proposed Policy Memo "Accrual of Unlawful Presence and F, J, and M Nonimmigrants" (PM-602-1060), posted on May 11, 2018.</p> <p>I am an F-1 international student who has recently graduated from Northwestern Polytechnic University and am working based on Curriculum Practical Training (CPT). My employer has recently petitioned for my H-1B work visa during the cap-subject application period in April.</p> <p>My concern with the proposed memorandum is that its new calculation of accrual of unlawful presence may jeopardize my ability to obtain a nonimmigrant visa from a consulate. By essentially equating unlawful presence with failure to maintain proper status, the policy memo puts an undue burden on F-1 students and penalizes them retroactively. The new calculation would render F-1 students unlawfully present dating back to the day after a failure to maintain F-1 status began, rather than from the day of an adverse decision by DHS or an immigration judge.</p> <p>This is an undue burden and disproportionate penalty on us F-1 students because the policies for maintaining proper F-1 status have not always been made uniformly clear to us, or even to our DSOs. As an F-1 student, I rely heavily on my school's DSO in order to maintain valid status, as he or she</p>	

STAKEHOLDER/ ORGANIZATION	STAKEHOLDER COMMENTS	ORIGINATING OFFICE'S RESOLUTIONS
	<p>issues my I-20s, endorses the I-20s for work authorization, and updates my records in the SEVIS system. F-1 students may have engaged in certain employment activities with the full endorsement of their school's DSO, and issuance of an Employment Authorization Document by DHS, only to discover later that the initial grant of work authorization was improper.</p> <p>These inconsistencies are sometimes due to DSO error but are also due to DHS interpretations that may change without warning and get applied retroactively, to our detriment. Updates to USCIS interpretation of employer-employee relationships, for example, may retroactively invalidate an arrangement that I worked under during my OPT training period. The proposed policy memo would result in accrual of unlawful presence retroactively, during a period of time when USCIS policy was different or unclear.</p> <p>Furthermore, the extensive processing times for H-1B change of status petitions, combined with the suspension of premium processing for cap-subject H-1B applications, puts students like me at risk of having accrued unlawful presence for more than six months by the time USCIS has adjudicated my H-1B application and made a determination on whether I have maintained proper status. The extensive service center backlogs, suspension of premium processing, and sudden change in unlawful presence interpretation are all beyond the control of F-1 students. Under this memo, I may be determined to have unknowingly accrued several months of unlawful presence, and a possible 3- or 10-year bar against re-entry, without having possessed the intent to do so, and without any means to remedy my situation once I become aware of it.</p> <p>The accrual of unlawful presence calculation is currently linked to an adverse determination by DHS or an immigration judge (or by the expiration of an I-94) because such a determination actively puts the student on notice that he or she was no longer authorized to stay and/or work in the U.S., and should depart immediately. The calculation under this proposed memo will put students like me in a position to have possibly accrued several months of unlawful presence unknowingly. It is further exacerbated by the fact that their accrual of unlawful presence may have been endorsed by my school's DSO, the main immigration-related official that I have any contact with and on whom I rely. The application of the proposed memo will unfairly penalize students like me who have acted in good faith, who timely applied for work authorization, and acted according to the policies in effect at the time. It will affect our ability to apply for any other nonimmigrant visa in the U.S., as well as prevent us from applying for a visa at a consulate abroad due to the inadmissibility bar.</p> <p>It is not my intention to overstay my visa or to be unlawfully present in the U.S. I have come to study in the U.S. in order to gain a higher education in America's universities, and to supplement my education through hands-on work experience. My intention is to do so by complying with the relevant immigration regulations and policies. However, when those policies are not always clear, and my studies or work experience are being endorsed by the school's DSO, I feel I should not be penalized</p>	

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	<p>retroactively when I have acted in good faith and am informed later that there was a problem with my maintenance of status. I would advocate for the continuation of the current calculation of accrual of unlawful presence for F-1 individuals, which would allow for clear notice to the F-1 student concerning a failure to maintain proper status, a clear start date for the accrual of unlawful presence, and application of a re-entry bar only after remaining in the U.S. for a significant period beyond that notice. This calculation is equitable and avoids disproportionately penalizing students who have acted in good faith, and would allow us an opportunity to remedy our visa status once we become aware of the problem by being able to depart the U.S. as soon as we become aware that unlawful presence has begun to accrue.</p> <p>I urge against the implementation of this proposed policy memo. Thank you for your consideration, time, and support in this matter.</p> <p>Sincerely,</p>	
<p>Jason Saavedra [REDACTED]@[REDACTED]</p>	<p>In addition, conversations must be had regarding the fact that Section 214(b) of the Immigration and Nationality Act is not being enforced by our consular officers. Strictly adhering to the law here would provide Americans relief from hundreds of thousands of foreign nationals overstaying their visas annually. USCIS (specifically the Director) should be in contact with DHS and Consular Affairs about the importance of 214(b). Visa issuance rates are out of control and must be decreased.</p> <p>On Wednesday, June 6, 2018, Jason Saavedra <jvedra07@gmail.com> wrote: Hello,</p> <p>It is absolutely necessary that Mr. Cissna and USCIS as a whole look into the problems associated with adjustments of status. While it has its purposes, it also undeniably operates as a perpetual amnesty. As Jessica Vaughan wrote in her article (https://cis.org/Shortcuts-Immigration-Temporary-Visa-Program-Broken), such nonimmigrant visas operate in part as a "gray-market alternative" to the immigrant visa (IV) program. Adjustments of status are undeniably facilitating and encouraging this gray-market alternative to our immigration system.</p> <p>If attempts to severely restrict adjustments of status are not considered and implemented, the line between IV and NIV will continue to blur. As USCIS statistics have shown, over 90% of adjustment of status applications have been approved:</p> <p>https://www.uscis.gov/tools/reports-studies/immigration-forms-data/data-set-form-i-485-application-adjustment-status</p>	

Accrual of Unlawful Presence and F, J, and M Nonimmigrants



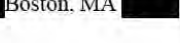

Stakeholder Comments Matrix

STAKEHOLDER/ ORGANIZATION	STAKEHOLDER COMMENTS	ORIGINATING OFFICE'S RESOLUTIONS
	<p>Bottom line: this has and will continue to undermine our immigration system AND ICE's attempts to successfully deport illegals (especially overstays).</p> <p>To truly target visa overstays and strongly discourage people from overstaying in the future, the Director (USCIS) must immediately look into adjustments of status and proceed accordingly from there with our Attorney General.</p> <p>Sincerely,</p>	
<p>Krishna Chai [REDACTED]@[REDACTED]</p>	<p>Dear Director:</p> <p>I would like to submit the following comments in response to the USCIS Proposed Policy Memo "Accrual of Unlawful Presence and F, J, and M Nonimmigrants" (PM-602-1060), posted on May 11, 2018.</p> <p>First, I would like to start by saying I support this memo partially and against it partially. The part I support is that when a student overstays his/her visa intentionally they should be banned from entering United States unless they have a very strong reason for their overstay like medical or severe financial problems due to which they couldn't go back to their home country after completion of the course and the grace period. I think in such case this policy memo is very appropriate.</p> <p>This policy also focuses on unauthorized activity carried out by the students while they are on F1 status. If a student indulges in an activity authorized by DSO but USCIS later determines it as illegal/unauthorized, then this burden should NOT be put on a student because all international student completely depend on their DSO to maintain their legal status. Previously, policy stated that accrual of unlawful presence would start from the day on which USCIS determines that a student has been out of status. So student had a chance to rectify the issue and reinstate his/her status even if it was DSO's error but now if this policy comes into effect student may not get a chance to fall back into legal status and may be banned from entering into United States for 3 or more years even if it not students mistake and student was out of status due to DSO's error or due to sudden change of interpretation of a law by USCIS.</p> <p>I personally think that other than visa overstay issue USCIS should follow the current regulation for calculating the length of unlawful presence.</p> <p>I kindly request director and other senior officials of USCIS to do the needful on points I have focused on in this mail. I have complete faith in the US law system and USCIS that it will not punish any innocent.</p> <p>Thanks.</p>	
<p>Marisol Bayona Roman</p>	<p>To whom it may concern,</p>	

STAKEHOLDER/ ORGANIZATION	STAKEHOLDER COMMENTS	ORIGINATING OFFICE'S RESOLUTIONS
<p>██████████@██████████</p> <p>University of Texas at Austin Austin, TX ██████████</p>	<p>I am writing to you to voice my thoughts on the proposed policy change "Accrual of Unlawful Presence and F, J, and M Nonimmigrants."</p> <p>I am a graduate student at the UT Austin department of Germanic studies. Given the inherently international character of my field, I have several colleagues (at UT and at other academic institutions in the United States) who require VISAs as part of their employment in the United States. Countless times have I seen them try to coordinate their lives in convoluted ways to abide by strict VISA requirements that seem to have no reasonable grounds. Colleagues (graduate students, lecturers, adjunct professors) have to fly back to their country of origin after the end of an academic year to file a new VISA for their new employment (even if at the same institution) only to then fly back to their home in the US, or temporarily move back to their country of origin out of sheer necessity because they are not employed during the summer by their institution and are prohibited from seeking work elsewhere, regardless of whether they have continuing employment in the fall and spring semesters. All of this at their own expense, planned around arbitrary dates that do not necessarily align with their lives in the US. To require law-abiding VISA holders who positively contribute to our educational system to spend valuable time and money (especially in the case of graduate students, who are grievously underpaid as it is) is simply irresponsible and disruptive to their lives. The "accrual of unlawful presence" would only make matters worse for them. For this reason, I strongly oppose this proposal. I'm sure many others think the same way and so I hope you will take their concerns into consideration.</p> <p>Regards,</p>	
<p>Rachel Baskin, Esq rachel@baskinvisalaw.com Long Island Office (Mailing Address) ██████████ Oceanside, New York ██████████ New York City Office ██████████ New York, New York ██████████ Office: ██████████</p>	<p>Dear Madam or Sir:</p> <p>I am writing to express my opposition and concerns regarding the new policy memorandum, "Accrual of Unlawful Presence and F, J, and M Nonimmigrants," posted by U.S. Citizenship and Immigration Services (USCIS) on May 11, 2018.</p> <p>Briefly stated, the new memorandum will reverse more than 20 years of USCIS practice regarding the accrual of "unlawful presence," a legal term defined under section 212(a)(9)(B)(ii) of the Immigration and Nationality Act (INA) by reference to an individual who "is present in the United States after expiration of the period of stay authorized by the Attorney General or is present in the United States without being admitted or paroled." For nonimmigrant students and exchange visitors in the F, J, and M</p>	

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	<p>categories, legacy Immigration and Naturalization Service (INS) and USCIS have interpreted the statutory unlawful presence provisions to require notice to the individual of a status violation prior to the commencement of the unlawful presence clock. Such notice is provided in the context of the adjudication of a request for an immigration benefit by USCIS or a determination of a status violation by an immigration judge. The USCIS guidance articulating this position states, "It must be emphasized that the accrual of unlawful presence neither begins on the date that a status violation occurs, nor on the day on which removal proceedings are initiated." (See USCIS Memorandum, Consolidation of Guidance Concerning Unlawful Presence for Purposes of Sections 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I) of the Act," (May 6, 2009), available at http://www.aila.org/infonet/uscis-consolidation-guidance-unlawful-presence.) This longstanding policy provides certainty in determining when unlawful presence begins to accrue, which the new policy does not.</p> <p>As described in the May 11, 2018 memorandum, USCIS will now deem unlawful presence to have started accruing as of the day after the date that a status violation occurs, thus removing the critical procedural safeguard of providing notice to affected individuals that may find themselves subject to the three- and ten-year bars to admissibility. This raises serious questions regarding fundamental fairness and due process and will have a significant negative impact on the student, vocational, and exchange visitor communities.</p> <p>In recognition of the fluidity of academic programs, F, M, and J nonimmigrants are not admitted to the U.S. until a date-certain. Instead, they are admitted for the "duration of their status," or "D/S," which means the student or exchange visitor can remain in the United States as long as they maintain their nonimmigrant status. This generally means the student must maintain a full course of study or remain in the exchange program, not engage in unauthorized employment or other unauthorized activities, and complete the academic or exchange program in a timely manner or obtain an extension. What the new memorandum fails to recognize is that the question as to whether an individual has violated their nonimmigrant status is complex and nuanced.</p> <p>Students and exchange visitors can accidentally and unknowingly violate their status by dropping slightly below a full course of study, or by engaging in innocent, but unauthorized activity. For example, F-1 students are permitted to engage in work at a "qualifying on-campus job" for up to 20 hours per week while school is in session. Therefore, an F-1 student who inadvertently exceeds the 20-hour limit by just a couple of hours has technically violated his or her student status.</p> <p>In addition, a Designated School Official may make a good faith error in advising a student by</p>	

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	<p>authorizing a reduced course load that should not have been approved, thereby leading the student to unknowingly and unintentionally violate their status. This unfairness is compounded when the status violation also serves as the "trigger" for the accrual of unlawful presence by dependents of students and exchange visitors.</p> <p>USCIS states that the purpose of the new guidance is to "reduce the number of overstay" and "to improve how USCIS implements the unlawful presence ground of inadmissibility." Unfortunately, this approach accomplishes neither of these goals and will instead unfairly punish a potentially significant portion of the student and exchange visitor population, further erode foreign student enrollments at U.S. colleges and universities, and unnecessarily damage the U.S. economy.</p> <p>Finally, and perhaps most importantly, the Service's interpretation of unlawful presence is longstanding and not specifically defined in the statute or regulations. Accordingly, if the Service wishes to formally define the term "unlawful presence," the way to do so is by drafting new regulations; not a memorandum. Defining unlawful presence by memorandum is a clear violation of the Administrative Procedures Act (APA).</p> <p>Based on the foregoing, I urge USCIS to abandon this misguided directive and to maintain the unlawful presence guidance that has been in place for decades and ensures that fundamental fairness is a critical component in interpreting and implementing the unlawful presence statute. Should the Service wish to define the term with more precision; then USCIS must draft proposed regulations, and allow for a notice and comment period, in compliance with the APA.</p> <p>Sincerely,</p>	
<p>Jason Saavedra [REDACTED]@[REDACTED]</p>	<p>On Sunday, June 10, 2018, Jason Saavedra <jvedra07@gmail.com> wrote: In addition, conversations must be had regarding the fact that Section 214(b) of the Immigration and Nationality Act is not being enforced by our consular officers. Strictly adhering to the law here would provide Americans relief from hundreds of thousands of foreign nationals overstaying their visas annually. USCIS (specifically the Director) should be in contact with DHS and Consular Affairs about the importance of 214(b). Visa issuance rates are out of control and must be decreased.</p> <p>On Wednesday, June 6, 2018, Jason Saavedra <jvedra07@gmail.com> wrote: Hello,</p> <p>It is absolutely necessary that Mr. Cissna and USCIS as a whole look into the problems associated with</p>	

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<p>Maggie Shirland   Boston, MA  USA tel: </p>	<p>Dear Madam or Sir:</p> <p>I am writing to express my opposition and concerns regarding the new policy memorandum, “Accrual of Unlawful Presence and F, J, and M Nonimmigrants,” posted by U.S. Citizenship and Immigration Services (USCIS) on May 11, 2018.</p> <p>Briefly stated, the new memorandum will reverse more than 20 years of USCIS practice regarding the accrual of “unlawful presence,” a legal term defined under section 212(a)(9)(B)(ii) of the Immigration and Nationality Act (INA) by reference to an individual who “is present in the United States after expiration of the period of stay authorized by the Attorney General or is present in the United States without being admitted or paroled.” For nonimmigrant students and exchange visitors in the F, J, and M categories, legacy Immigration and Naturalization Service (INS) and USCIS have interpreted the statutory unlawful presence provisions to require notice to the individual of a status violation prior to</p>	

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	<p>the commencement of the unlawful presence clock. Such notice is provided in the context of the adjudication of a request for an immigration benefit by USCIS or a determination of a status violation by an immigration judge. The USCIS guidance articulating this position states, "It must be emphasized that the accrual of unlawful presence neither begins on the date that a status violation occurs, nor on the day on which removal proceedings are initiated." [1] This longstanding policy provides certainty in determining when unlawful presence begins to accrue, which the new policy does not.</p> <p>As described in the May 11, 2018 memorandum, USCIS will now deem unlawful presence to have started accruing as of the day after the date that a status violation occurs, thus removing the critical procedural safeguard of providing notice to affected individuals that may find themselves subject to the three- and ten-year bars to admissibility. This raises serious questions regarding fundamental fairness and due process and will have a significant negative impact on the student, vocational, and exchange visitor communities.</p> <p>In recognition of the fluidity of academic programs, F, M, and J nonimmigrants are not admitted to the U.S. until a date-certain. Instead, they are admitted for the "duration of their status," or "D/S," which means the student or exchange visitor can remain in the United States as long as they maintain their nonimmigrant status. This generally means the student must maintain a full course of study or remain in the exchange program, not engage in unauthorized employment or other unauthorized activities, and complete the academic or exchange program in a timely manner or obtain an extension. What the new memorandum fails to recognize is that the question as to whether an individual has violated their nonimmigrant status is complex and nuanced. Students and exchange visitors can accidentally and unknowingly violate their status by dropping slightly below a full course of study, or by engaging in innocent, but unauthorized activity. For example, F-1 students are permitted to engage in work at a "qualifying on-campus job" for up to 20 hours per week while school is in session. Therefore, an F-1 student who inadvertently exceeds the 20-hour limit by just a couple of hours has technically violated his or her student status. In addition, a Designated School Official may make a good faith error in advising a student by authorizing a reduced course load that should not have been approved, thereby leading the student to unknowingly and unintentionally violate their status. This unfairness is compounded when the status violation also serves as the "trigger" for the accrual of unlawful presence by dependents of students and exchange visitors.</p> <p>USCIS states that the purpose of the new guidance is to "reduce the number of overstays" and "to improve how USCIS implements the unlawful presence ground of inadmissibility." Unfortunately, this approach accomplishes neither of these goals and will instead unfairly punish a potentially significant</p>	

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	<p>portion of the student and exchange visitor population, further erode foreign student enrollments at U.S. colleges and universities, and unnecessarily damage the U.S. economy. I urge USCIS to abandon this misguided directive and to maintain the unlawful presence guidance that has been in place for decades and ensures that fundamental fairness is a critical component in interpreting and implementing the unlawful presence statute.</p> <p>Sincerely,</p>	
<p>Delgerjargal Betcher [REDACTED]@[REDACTED]</p>	<p>Dear Director Cissna:</p> <p>My name is Delgerjargal Betcher and I have been working in the field of International Education at a post-secondary institution for 8 years. I am writing in response to the U.S. Citizenship and Immigration Services (USCIS) policy memorandum dated May 10, 2018, "Accrual of Unlawful Presence and F, J, M Nonimmigrants."</p> <p>I strongly encourage you to revisit the proposed changes as they will discourage brilliant international students and scholars from pursuing their education and research goals in the US.</p> <p>The most appalling change proposed in this memorandum is that which creates the start of the unlawful presence accrual not from the date of USCIS's denial a student's petition but from the date the application was received. The current processing times for requests for Optional Practical Training (OPT), STEM OPT Extensions, Change of Status and Reinstatement applications range from three months to more than one year. This means that if a student graduates from their program of study and applies for OPT in a timely manner, and USCIS denies the OPT application, a student would have accrued 3-5 months of unlawful presence even though the student was following the proper guidelines. International students should not be penalized for USCIS's long processing times.</p> <p>In the case of reinstatement applications, the processing times are even longer, and the consequences of a reinstatement denial would be overly severe for students. Many international students arrive to the US when they are 17-18 years old. Sometimes, because of miscommunication or simple oversight, a student may drop a class without informing their Designated School Official. We already "punish" students by terminating their SEVIS record and requiring them to apply for reinstatement (fees required.) If a student's request for reinstatement is approved, the student is back in status with full ability to use F1 benefits like CPT and OPT. But if the reinstatement application is denied, then a student has accrued 8-12 months of unlawful presence and is subject to 3 or 10 year bar. The student would likely be unable to complete their degree in the US with this bar. This is an exceptionally harsh punishment and a unfair high standard of conduct.</p> <p>Again, I urge you to reconsider the consequences of this change in the accrual of unlawful presence. International students are a great asset to our country, and this type of policy could damage our</p>	

STAKEHOLDER/ ORGANIZATION	STAKEHOLDER COMMENTS	ORIGINATING OFFICE'S RESOLUTIONS
	<p>population irrevocably. Thank you for the opportunity to comment. Sincerely,</p>	
<p>Rayudu Ramiseti [REDACTED]@[REDACTED]</p>	<p>Dear Director:</p> <p>I would like to submit the following comments in response to the USCIS Proposed Policy Memo "Accrual of Unlawful Presence and F, J, and M Nonimmigrants" (PM-602-1060), posted on May 11, 2018.</p> <p>I am an F-1 international student who has recently graduated from Illinois Institute of Technology and am working based on Optional Practical Training (OPT). My employer has recently petitioned for my H-1B work visa during the cap-subject application period in April.</p> <p>My concern with the proposed memorandum is that its new calculation of accrual of unlawful presence may jeopardize my ability to obtain a nonimmigrant visa from a consulate. By essentially equating unlawful presence with failure to maintain proper status, the policy memo puts an undue burden on F-1 students and penalizes them retroactively. The new calculation would render F-1 students unlawfully present dating back to the day after a failure to maintain F-1 status began, rather than from the day of an adverse decision by DHS or an immigration judge.</p> <p>This is an undue burden and disproportionate penalty on us F-1 students because the policies for maintaining proper F-1 status have not always been made uniformly clear to us, or even to our DSOs. As an F-1 student, I rely heavily on my school's DSO in order to maintain valid status, as he or she issues my I-20s, endorses the I-20s for work authorization, and updates my records in the SEVIS system. F-1 students may have engaged in certain employment activities with the full endorsement of their school's DSO, and issuance of an Employment Authorization Document by DHS, only to discover later that the initial grant of work authorization was improper.</p> <p>These inconsistencies are sometimes due to DSO error but are also due to DHS interpretations that may change without warning and get applied retroactively, to our detriment. Updates to USCIS interpretation of employer-employee relationships, for example, may retroactively invalidate an arrangement that I worked under during my OPT training period. The proposed policy memo would result in accrual of unlawful presence retroactively, during a period of time when USCIS policy was different or unclear.</p> <p>Furthermore, the extensive processing times for H-1B change of status petitions, combined with the suspension of premium processing for cap-subject H-1B applications, puts students like me at risk of having accrued unlawful presence for more than six months by the time USCIS has adjudicated my H-1B application and made a determination on whether I have maintained proper status. The extensive service center backlogs, suspension of premium processing, and sudden change in unlawful presence interpretation are all beyond the control of F-1 students. Under this memo, I may be determined to have</p>	

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Charan G [REDACTED]@[REDACTED]	<p>Dear Director:</p> <p>I would like to submit the following comments in response to the USCIS Proposed Policy Memo "Accrual of Unlawful Presence and F, J, and M Nonimmigrants" (PM-602-1060), posted on May 11, 2018.</p>	

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<p>Raghu Vr [REDACTED]@[REDACTED]</p>	<p>Dear Director:</p> <p>I would like to submit the following comments in response to the USCIS Proposed Policy Memo "Accrual of Unlawful Presence and F, J, and M Nonimmigrants" (PM-602-1060), posted on May 11, 2018.</p> <p>I am an F-1 international student who has recently graduated from [university] and am working based on Optional Practical Training (OPT). My employer has recently petitioned for my H-1B work visa during the cap-subject application period in April.</p> <p>My concern with the proposed memorandum is that its new calculation of accrual of unlawful presence may jeopardize my ability to obtain a nonimmigrant visa from a consulate. By essentially equating unlawful presence with failure to maintain proper status, the policy memo puts an undue burden on F-1 students and penalizes them retroactively. The new calculation would render F-1 students unlawfully present dating back to the day after a failure to maintain F-1 status began, rather than from the day of an adverse decision by DHS or an immigration judge.</p> <p>This is an undue burden and disproportionate penalty on us F-1 students because the policies for maintaining proper F-1 status have not always been made uniformly clear to us, or even to our DSOs. As an F-1 student, I rely heavily on my school's DSO in order to maintain valid status, as he or she issues my I-20s, endorses the I-20s for work authorization, and updates my records in the SEVIS system. F-1 students may have engaged in certain employment activities with the full endorsement of their school's DSO, and issuance of an Employment Authorization Document by DHS, only to discover later that the initial grant of work authorization was improper.</p> <p>These inconsistencies are sometimes due to DSO error but are also due to DHS interpretations that may change without warning and get applied retroactively, to our detriment. Updates to USCIS interpretation of employer-employee relationships, for example, may retroactively invalidate an arrangement that I worked under during my OPT training period. The proposed policy memo would result in accrual of unlawful presence retroactively, during a period of time when USCIS policy was</p>	

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Iran Carranza [REDACTED]@[REDACTED]	<p>Dear Madam or Sir:</p> <p>I am writing to express my opposition and concerns regarding the new policy memorandum, "Accrual of Unlawful Presence and F, J, and M Nonimmigrants," posted by U.S. Citizenship and Immigration Services (USCIS) on May 11, 2018.</p> <p>Briefly stated, the new memorandum will reverse more than 20 years of USCIS practice regarding the accrual of "unlawful presence," a legal term defined under section 212(a)(9)(B)(ii) of the Immigration and Nationality Act (INA) by reference to an individual who "is present in the United States after expiration of the period of stay authorized by the Attorney General or is present in the United States without being admitted or paroled." For nonimmigrant students and exchange visitors in the F, J, and M categories, legacy Immigration and Naturalization Service (INS) and USCIS have interpreted the statutory unlawful presence provisions to require notice to the individual of a status violation prior to the commencement of the unlawful presence clock. Such notice is provided in the context of the adjudication of a request for an immigration benefit by USCIS or a determination of a status violation by an immigration judge. The USCIS guidance articulating this position states, "It must be emphasized that the accrual of unlawful presence neither begins on the date that a status violation occurs, nor on the day on which removal proceedings are initiated." [1] This longstanding policy provides certainty in determining when unlawful presence begins to accrue, which the new policy does not.</p> <p>As described in the May 11, 2018 memorandum, USCIS will now deem unlawful presence to have started accruing as of the day after the date that a status violation occurs, thus removing the critical procedural safeguard of providing notice to affected individuals that may find themselves subject to the three- and ten-year bars to admissibility. This raises serious questions regarding fundamental fairness and due process and will have a significant negative impact on the student, vocational, and exchange visitor communities.</p> <p>In recognition of the fluidity of academic programs, F, M, and J nonimmigrants are not admitted to the U.S. until a date-certain. Instead, they are admitted for the "duration of their status," or "D/S," which means the student or exchange visitor can remain in the United States as long as they maintain their nonimmigrant status. This generally means the student must maintain a full course of study or remain in the exchange program, not engage in unauthorized employment or other unauthorized activities, and</p>	

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	<p>complete the academic or exchange program in a timely manner or obtain an extension. What the new memorandum fails to recognize is that the question as to whether an individual has violated their nonimmigrant status is complex and nuanced. Students and exchange visitors can accidentally and unknowingly violate their status by dropping slightly below a full course of study, or by engaging in innocent, but unauthorized activity. For example, F-1 students are permitted to engage in work at a "qualifying on-campus job" for up to 20 hours per week while school is in session. Therefore, an F-1 student who inadvertently exceeds the 20-hour limit by just a couple of hours has technically violated his or her student status. In addition, a Designated School Official may make a good faith error in advising a student by authorizing a reduced course load that should not have been approved, thereby leading the student to unknowingly and unintentionally violate their status. This unfairness is compounded when the status violation also serves as the "trigger" for the accrual of unlawful presence by dependents of students and exchange visitors.</p> <p>USCIS states that the purpose of the new guidance is to "reduce the number of overstays" and "to improve how USCIS implements the unlawful presence ground of inadmissibility." Unfortunately, this approach accomplishes neither of these goals and will instead unfairly punish a potentially significant portion of the student and exchange visitor population, further erode foreign student enrollments at U.S. colleges and universities, and unnecessarily damage the U.S. economy. I urge USCIS to abandon this misguided directive and to maintain the unlawful presence guidance that has been in place for decades and ensures that fundamental fairness is a critical component in interpreting and implementing the unlawful presence statute.</p> <p>Sincerely,</p>	
Anand Reddy  @ 	<p>Dear Director:</p> <p>I would like to submit the following comments in response to the USCIS Proposed Policy Memo "Accrual of Unlawful Presence and F, J, and M Nonimmigrants" (PM-602-1060), posted on May 11, 2018.</p> <p>I am an F-1 international student who is working on STEM OPT. My employer has recently petitioned for my H-1B work visa during the cap-subject application period in April.</p> <p>My concern with the proposed memorandum is that its new calculation of accrual of unlawful presence may jeopardize my ability to obtain a nonimmigrant visa from a consulate. By essentially equating unlawful presence with failure to maintain proper status, the policy memo puts an undue burden on F-1 students and penalizes them retroactively. The new calculation would render F-1 students unlawfully present dating back to the day after a failure to maintain F-1 status began, rather than from the day of an adverse decision by DHS or an immigration judge.</p>	

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	<p>This is an undue burden and disproportionate penalty on us F-1 students because the policies for maintaining proper F-1 status have not always been made uniformly clear to us, or even to our DSOs. As an F-1 student, I rely heavily on my school's DSO in order to maintain valid status, as he or she issues my I-20s, endorses the I-20s for work authorization, and updates my records in the SEVIS system. F-1 students may have engaged in certain employment activities with the full endorsement of their school's DSO, and issuance of an Employment Authorization Document by DHS, only to discover later that the initial grant of work authorization was improper.</p> <p>These inconsistencies are sometimes due to DSO error but are also due to DHS interpretations that may change without warning and get applied retroactively, to our detriment. Updates to USCIS interpretation of employer-employee relationships, for example, may retroactively invalidate an arrangement that I worked under during my OPT training period. The proposed policy memo would result in accrual of unlawful presence retroactively, during a period of time when USCIS policy was different or unclear.</p> <p>Furthermore, the extensive processing times for H-1B change of status petitions, combined with the suspension of premium processing for cap-subject H-1B applications, puts students like me at risk of having accrued unlawful presence for more than six months by the time USCIS has adjudicated my H-1B application and made a determination on whether I have maintained proper status. The extensive service center backlogs, suspension of premium processing, and sudden change in unlawful presence interpretation are all beyond the control of F-1 students. Under this memo, I may be determined to have unknowingly accrued several months of unlawful presence, and a possible 3- or 10-year bar against re-entry, without having possessed the intent to do so, and without any means to remedy my situation once I become aware of it.</p> <p>The accrual of unlawful presence calculation is currently linked to an adverse determination by DHS or an immigration judge (or by the expiration of an I-94) because such a determination actively puts the student on notice that he or she was no longer authorized to stay and/or work in the U.S., and should depart immediately. The calculation under this proposed memo will put students like me in a position to have possibly accrued several months of unlawful presence unknowingly. It is further exacerbated by the fact that their accrual of unlawful presence may have been endorsed by my school's DSO, the main immigration-related official that I have any contact with and on whom I rely. The application of the proposed memo will unfairly penalize students like me who have acted in good faith, who timely applied for work authorization, and acted according to the policies in effect at the time. It will affect our ability to apply for any other nonimmigrant visa in the U.S., as well as prevent us from applying for a visa at a consulate abroad due to the inadmissibility bar.</p> <p>It is not my intention to overstay my visa or to be unlawfully present in the U.S. I have come to study in the U.S. in order to gain a higher education in America's universities, and to supplement my education</p>	

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	<p>through hands-on work experience. My intention is to do so by complying with the relevant immigration regulations and policies. However, when those policies are not always clear, and my studies or work experience are being endorsed by the school's DSO, I feel I should not be penalized retroactively when I have acted in good faith and am informed later that there was a problem with my maintenance of status. I would advocate for the continuation of the current calculation of accrual of unlawful presence for F-1 individuals, which would allow for clear notice to the F-1 student concerning a failure to maintain proper status, a clear start date for the accrual of unlawful presence, and application of a re-entry bar only after remaining in the U.S. for a significant period beyond that notice. This calculation is equitable and avoids disproportionately penalizing students who have acted in good faith, and would allow us an opportunity to remedy our visa status once we become aware of the problem by being able to depart the U.S. as soon as we become aware that unlawful presence has begun to accrue.</p> <p>I urge against the implementation of this proposed policy memo. Thank you for your consideration, time, and support in this matter.</p> <p>Sincerely,</p>	
<p>Nishanth Chunchula [REDACTED]@[REDACTED]</p>	<p>Dear Director:</p> <p>I would like to submit the following comments in response to the USCIS Proposed Policy Memo "Accrual of Unlawful Presence and F, J, and M Nonimmigrants" (PM-602-1060), posted on May 11, 2018.</p> <p>I am an F-1 international student who has recently graduated from [university] and am working based on Optional Practical Training (OPT). My employer has recently petitioned for my H-1B work visa during the cap-subject application period in April.</p> <p>My concern with the proposed memorandum is that its new calculation of accrual of unlawful presence may jeopardize my ability to obtain a nonimmigrant visa from a consulate. By essentially equating unlawful presence with failure to maintain proper status, the policy memo puts an undue burden on F-1 students and penalizes them retroactively. The new calculation would render F-1 students unlawfully present dating back to the day after a failure to maintain F-1 status began, rather than from the day of an adverse decision by DHS or an immigration judge.</p> <p>This is an undue burden and disproportionate penalty on us F-1 students because the policies for maintaining proper F-1 status have not always been made uniformly clear to us, or even to our DSOs. As an</p>	

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Accrual of Unlawful Presence and F, J, and M Nonimmigrants

Stakeholder Comments Matrix

STAKEHOLDER/ ORGANIZATION	STAKEHOLDER COMMENTS	ORIGINATING OFFICE'S RESOLUTIONS
	<p>It is not my intention to overstay my visa or to be unlawfully present in the U.S. I have come to study in the U.S. in order to gain a higher education in America's universities, and to supplement my education through hands-on work experience. My intention is to do so by complying with the relevant immigration regulations and policies.</p> <p>However, when those policies are not always clear, and my studies or work experience are being endorsed by the school's DSO, I feel I should not be penalized retroactively when I have acted in good faith and am informed later that there was a problem with my maintenance of status. I would advocate for the continuation of the current calculation of accrual of unlawful presence for F-1 individuals, which would allow for clear notice to the F-1 student concerning a failure to maintain proper status, a clear start date for the accrual of unlawful presence, and application of a re-entry bar only after remaining in the U.S. for a significant period beyond that notice.</p> <p>This calculation is equitable and avoids disproportionately penalizing students who have acted in good faith, and would allow us an opportunity to remedy our visa status once we become aware of the problem by being able to depart the U.S. as soon as we become aware that unlawful presence has begun to accrue.</p> <p>I urge against the implementation of this proposed policy memo. Thank you for your consideration, time, and support in this matter.</p> <p>Sincerely,</p>	
<p>Timothy Polom [REDACTED]@[REDACTED]</p>	<p>Hello,</p> <p>Many of my colleagues are bright, charismatic, and contributing international students, and the new proposed policy could negatively affect their professional and personal lives. Please do not pass the policy.</p> <p>Best regards, Tim Polom University of Wisconsin-Madison Ph.D. Student Department of Mechanical Engineering</p>	
<p>Kulsum J. Hafeez [REDACTED]@[REDACTED] Corporate Counsel Ramsoft Systems, Inc. [REDACTED] Southfield, MI P: [REDACTED]</p>	<p>Dear Director,</p> <p>I would like to submit the following comments in response to the USCIS Proposed Policy Memo "Accrual of Unlawful Presence and F, J, and M Nonimmigrants" (PM-602-1060), posted on May 11, 2018.</p> <p>I am the Corporate Counsel of an IT Solutions and Staffing company that has been in business for the</p>	



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	<p>last 25 years, and whose employees include recently-graduated international students who are in the U.S. on an F-1 visa and are working based on their Optional Practical Training (OPT). Our company has employed these graduates during their OPT period, provided them with training, and recently applied for these employees' H-1B work visa during the cap-subject application period in April.</p> <p>Our concern with the proposed memorandum is that our F-1 employees' ability to obtain a nonimmigrant visa from a consulate may be jeopardized by the new calculation of accrual of unlawful presence. By essentially equating unlawful presence with failure to maintain proper status, the policy memo puts an undue burden on F-1 students and penalizes them retroactively. The new calculation would render F-1 students unlawfully present dating back to the day after their failure to maintain F-1 status began, rather than from the day of an adverse decision by DHS or an immigration judge.</p> <p>This is an undue burden and disproportionate penalty on the F-1 students, and on our company as their employer, because the policies for maintaining proper F-1 status have not always been made uniformly clear to the students, their employers, and even to the DSOs. F-1 students rely heavily on their school's DSO in order to maintain valid status, as the DSO issues them I-20s, endorses them for work authorization, and updates their records in the SEVIS system. F-1 students may have engaged in certain employment activities with the full endorsement of their school's DSO, and issuance of an Employment Authorization Document by DHS, only to discover later that the initial grant of work authorization was improper.</p> <p>These inconsistencies are sometimes due to DSO error but are also due to DHS interpretations that may change without warning and get applied retroactively, to the students' and their employers' detriment. Updates to USCIS interpretation of employer-employee relationships, for example, may retroactively invalidate a work arrangement in place during a student's OPT period. The proposed policy memo would result in the student accruing unlawful presence retroactively, during a period of time when USCIS policy was different or unclear.</p> <p>Furthermore, the extensive processing times for an H-1B change of status petitions, combined with the suspension of premium processing for cap-subject H-1B applications, puts these students at risk of having accrued unlawful presence for more than six months by the time USCIS has adjudicated the application and made a determination on the status issue. The extensive service center backlogs, suspension of premium processing, and sudden change in unlawful presence interpretation are all beyond the control of the F-1 students and their employers. Under this memo, students may be determined to have unknowingly accrued several months of unlawful presence, and a possible 3- or 10-</p>	

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	<p>year bar against re-entry, without having possessed the intent to do so, and without any means to remedy their situation once they become aware of it.</p> <p>The accrual of unlawful presence calculation is currently linked to an adverse determination by DHS or an immigration judge (or by the expiration of an I-94) because such a determination actively puts the student on notice that he or she was no longer authorized to stay and/or work in the U.S., and should depart immediately. The calculation under this proposed memo will put students in a position to have possibly accrued several months of unlawful presence unknowingly. It is further exacerbated by the fact that their accrual of unlawful presence may have been endorsed by their school's DSO, the main immigration-related official that most of the students have any contact with and on whom they rely. The application of the proposed memo will unfairly penalize students who have acted in good faith, who timely applied for work authorization that was made available to them, and acted according to the policies in effect at the time. It will affect their ability to apply for any other nonimmigrant visa in the U.S., as well as prevent them from applying for a visa at a consulate abroad due to the inadmissibility bar.</p> <p>As an employer of these recent graduates, the implementation of this memo will also adversely affect our business, as we have invested in training them during their OPT period and have sponsored them for their H-1B visa. Our company likewise acted in good faith in employing them pursuant to their Employment Authorization Documents, in training them, and in seeking to employ them further so that they can contribute to our business. Our investment in these students may be lost with the implementation of this memo if they can be found retroactively unlawfully present, with a possible years-long bar against re-entry.</p> <p>We would advocate for the continuation of the current calculation of accrual of unlawful presence for F-1 individuals, which would allow for clear notice to the F-1 student concerning a failure to maintain proper status, a clear start date for the accrual of unlawful presence, and only penalizes them with a re-entry bar if they knowingly remain in the U.S. for a significant period beyond that notice. This calculation is equitable and avoids disproportionately penalizing students and their employers who have acted in good faith, and allows the students an opportunity to remedy their visa status once they become aware of the problem.</p> <p>We urge against the implementation of this proposed policy memo. Thank you for your consideration, time, and support in this matter.</p>	

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Cory Owen www.juilliard.edu EdD Assistant Dean of International Advisement & Diversity Initiatives Office of International Advisement The Juilliard School New York, NY	<p>Sincerely,</p> <p>Dear Director Cissna,</p> <p>As a dedicated educator focused on enhancing US higher education institutions by creating an environment that encourages academic exploration and growth, I am extremely concerned with the proposed USCIS policy memo of May 10, 2018, "Accrual of Unlawful Presence and F, J, and M Nonimmigrants." This is a radical change that does not take into account a variety of complications that are unique to higher education. Here are a few things to take into consideration:</p> <ul style="list-style-type: none"> • Students may fall out of status due to system glitches at the school—this happens quite frequently where the computer system will drop students from classes without notification. In a situation like this, it would not be the fault of the student and while they could file for a correction of their record, the current processing times for record corrections are astronomical and unfairly punishes the student for something that is often the fault of the school. • If a student is unable to attend classes (i.e. they were in a car accident and are in a coma), often the proper documentation for an RCL cannot be obtained in a timely manner which technically should result in a SEVIS termination. But obviously, if they're still in a coma, then they cannot leave the US and would accrue unlawful presence while physically being unable to leave. • Add/Drop deadlines make registration complicated. The rules about add/drop deadlines are often confusing for students and while US students often drop below hours if their grades are lower than they'd like (I've seen students drop classes because they're afraid of receiving a B!), international students wouldn't have this ability since often the RCL requirements are so stringent. • Not all DSOs are well resources and trained. At the recent NAFSA conference, we learned from SEVP that about 60% of SEVIS approved schools have 10 students or less. That means that those DSOs often have less experience with the regulations and may inadvertently terminate a student who should not have been terminated or failed to register someone on time. This would have an extremely negative impact on the student, again through no fault of their own. <p>I implore you to reconsider this memo. The currently policy has been an important aspect of the F/M/J status and to unfairly punish the thousands of non-immigrants who are lawfully here but may have technical difficulties seems to be a very extreme change in our message to the world.</p> <p>Thank you for the opportunity to comment. Should you have any questions, I'd be happy to discuss my concerns further.</p>	

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<p>Lee Seedorff [REDACTED]@[REDACTED] Senior Associate Director, International Student and Scholar Services International Programs [REDACTED] Iowa City, IA [REDACTED]</p>	<p>Sincerely,</p> <p>As Senior Associate Director of International Student and Scholar Services at the University of Iowa, I have a number of concerns and questions regarding the proposed policy change to having F, J, and M nonimmigrants begin to accrue unlawful presence.</p> <ul style="list-style-type: none"> • Unemployment while on OPT - Students engaged in the 12-month period of OPT may accumulate no more than 90 days of total unemployment time. However, currently the SEVIS system does not take steps to automatically terminate the records of those who reach 90 days, although the regulatory guidance indicates those students should consider their status to be ended and leave the U.S. How will this be implemented in SEVIS? • I-515 – Students who travel outside the U.S. without an updated signature may be given the I-515 upon entering, which must be submitted to Customs and Border Protection within 30 days of entering the U.S. What happens to those students who do not submit the form in time? Will unlawful presence begin to accrue? Will anything happen to the SEVIS record to show the record is now terminated? • Transfer of I-20 – Schools are told they cannot refuse to transfer the SEVIS record even when it is in terminated status. Will this practice continue? Or should schools advise any student who has lost status but who wants to transfer to leave the U.S. in order to avoid accumulating unlawful presence? • Clarity on Unlawful Presence and Bars – How will students/scholars and their DSO/ARO advisors know when/if unlawful presence has specifically begun to accrue, how much has accrued, and whether a bar is put in place? This information is crucial for universities in planning and advising purposes. Will this be reflected in SEVIS? • Errors in SEVIS – The recent release of the SEVIS portal for OPT STEM reporting, which permits students to directly enter information into SEVIS instead of traditionally going through the DSO, has already led to some errors where the system did not appropriately save information uploaded. Students may or may not be able to successfully resolve these issues on their own. They also may become confused and submit incorrect information to the system. Further future efforts to create more direct student-SEVIS interactions, thereby removing the important oversight of the DSO, will lead to further data problems and potentially incorrect information being reported, which may then compromise a student's status and impact unlawful presence accrual. • Errors at the Port of Entry – We still see errors made at Ports of Entry, with incorrect status (ex. B2 instead of F1) being entered in the arrival record, or expiration dates inappropriately being applied to F and J records instead of D/S (these are not I-515 cases). When brought to our attention by the students, we are able to work with CBP to fix the data errors, but otherwise have no idea an error was made. Students may be unaware/not understand there is a problem and that their status may be lost and 	

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	<p>unlawful presence begin to accrue.</p> <ul style="list-style-type: none"> Excessive Reinstatement and Change of Status Processing Times – Reinstatement and changes of status typically take several months to be reviewed and adjudicated, plus the change of status now carries new rules about maintaining the prior status until the new one is approved. If a student files for reinstatement or change of status in good faith and in a timely way, but several months pass before a decision is made, students who receive a denial may have already reached the point where they have reached 180 days and potentially be eligible to have a bar applied to them. If the unlawful presence policy is put in place, corresponding service improvements must first be made within the adjudication centers so that students who apply for benefits in a timely way are not caught in delays beyond their control. Excessive Punishment for Minor Infractions – The majority of students we see fall out of status do so for relatively minor reasons. While one may argue that the rules are the rules, a reasonable approach must also be taken considering most of these students are 18-19 years old and still learning to operate independently, despite the considerable assistance, guidance, and reminders our university provides. In some cases mental health plays a role in hindering a student's ability to deal with issues in a timely way. Most students we see lose status do so for the following reasons; in my view these reasons are not all equal in level of seriousness of the violation, and therefore consideration should be given to defining "minor infractions" and preventing them from having lasting impact/counting toward a bar: <ul style="list-style-type: none"> Failure to report/update US residential address in a timely way Enroll below full-time without authorization Forget to extend the I-20 or DS-2019 on time Work without authorization Graduate or complete authorized period of OPT/Academic Training then do not leave by the end of the established grace period. <p>It is my hope that close consideration will be given to these issues before proceeding with any changes regarding unlawful presence and the subsequent bars that will impact the lives of many students and scholars visiting the U.S.</p> <p>Thank you.</p>	
Jiazhen Zhu [REDACTED]@[REDACTED]	<p>Dear Director:</p> <p>I would like to submit the following comments in response to the USCIS Proposed Policy Memo "Accrual of Unlawful Presence and F, J, and M Nonimmigrants" (PM-602-1060), posted on May 11, 2018.</p>	

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	<p>I am an F-1 international student who study at UoNA.</p> <p>For the F-1 student, we rely on our DSO at the university. We won't hire lawyer to help us to maintenance our status. What we can do is to work close with DSO to make our status well. Sometimes if the DSO make some error, we don't know when our status is not valid which will lead to out of status for us based on the proposed policy memo. For example, at 2018-09-01, DSO take a mistake for my case, at 2019-04-01, if I apply for the H1b and USCIS find this issue, based on the proposed policy memo, I have been out of status for a while. So this proposed policy memo is not fair and unclear, also it makes F-1 student into risk all the time.</p> <p>Furthermore, now it is very time consuming for H-1B petitions. Also we don't have premium processing now. It will take a several months to even on year to process the one case. During those time, it puts students like me at risk of having accrued unlawful presence for more than six months by the time USCIS has adjudicated my H-1B application and made a determination on whether I have maintained proper status. Under this memo, I may be determined to have unknowingly accrued several months of unlawful presence, and a possible 3- or 10-year bar against re-entry, without having possessed the intent to do so, and without any means to remedy my situation once I become aware of it. I urge against the implementation of this proposed policy memo. Thank you for your consideration, time, and support in this matter.</p> <p>Sincerely,</p>	
<p>Kiran Chelluri  President Chelsoft Solutions Co. Work: </p>	<p>Dear Director:</p> <p>I would like to submit the following comments in response to the USCIS Proposed Policy Memo "Accrual of Unlawful Presence and F, J, and M Nonimmigrants" (PM-602-1060), posted on May 11, 2018.</p> <p>I am the [job title] of a [type of business] company whose employees include recently-graduated international students who are in the U.S. on an F-1 visa and are working based on their Optional Practical Training (OPT). Our company has employed these graduates during their OPT period, provided them with training, and recently applied for these employees' H-1B work visa during the cap-subject application period in April.</p> <p>Our concern with the proposed memorandum is that our F-1 employees' ability to obtain a nonimmigrant visa from a consulate may be jeopardized by the new calculation of accrual of unlawful presence. By essentially equating unlawful presence with failure to maintain proper status, the policy memo puts an undue burden on F-1 students and penalizes them retroactively. The new calculation would render F-1 students unlawfully present dating back to the day after their failure to maintain F-1 status began, rather than from the day of an adverse decision by DHS or an immigration judge.</p>	

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Kiran Chelluri @ President Chelsoft Solutions Co. Work:	<p>Dear Director:</p> <p>I would like to submit the following comments in response to the USCIS Proposed Policy Memo "Accrual of Unlawful Presence and F, J, and M Nonimmigrants" (PM-602-1060), posted on May 11, 2018.</p> <p>I am the President of a IT company whose employees include recently-graduated international students who are in the U.S. on an F-1 visa and are working based on their Optional Practical Training (OPT). Our company has employed these graduates during their OPT period, provided them with training, and recently applied for these employees' H-1B work visa during the cap-subject application period in April.</p>	

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	<p>Our concern with the proposed memorandum is that our F-1 employees' ability to obtain a nonimmigrant visa from a consulate may be jeopardized by the new calculation of accrual of unlawful presence. By essentially equating unlawful presence with failure to maintain proper status, the policy memo puts an undue burden on F-1 students and penalizes them retroactively. The new calculation would render F-1 students unlawfully present dating back to the day after their failure to maintain F-1 status began, rather than from the day of an adverse decision by DHS or an immigration judge.</p> <p>This is an undue burden and disproportionate penalty on the F-1 students, and on our company as their employer, because the policies for maintaining proper F-1 status have not always been made uniformly clear to the students, their employers, and even to the DSOs. F-1 students rely heavily on their school's DSO in order to maintain valid status, as the DSO issues them I-20s, endorses them for work authorization, and updates their records in the SEVIS system. F-1 students may have engaged in certain employment activities with the full endorsement of their school's DSO, and issuance of an Employment Authorization Document by DHS, only to discover later that the initial grant of work authorization was improper.</p> <p>These inconsistencies are sometimes due to DSO error but are also due to DHS interpretations that may change without warning and get applied retroactively, to the students' and their employers' detriment. Updates to USCIS interpretation of employer-employee relationships, for example, may retroactively invalidate a work arrangement in place during a student's OPT period. The proposed policy memo would result in the student accruing unlawful presence retroactively, during a period of time when USCIS policy was different or unclear.</p> <p>Furthermore, the extensive processing times for an H-1B change of status petitions, combined with the suspension of premium processing for cap-subject H-1B applications, puts these students at risk of having accrued unlawful presence for more than six months by the time USCIS has adjudicated the application and made a determination on the status issue. The extensive service center backlogs, suspension of premium processing, and sudden change in unlawful presence interpretation are all beyond the control of the F-1 students and their employers. Under this memo, students may be determined to have unknowingly accrued several months of unlawful presence, and a possible 3- or 10-year bar against re-entry, without having possessed the intent to do so, and without any means to remedy their situation once they become aware of it.</p> <p>The accrual of unlawful presence calculation is currently linked to an adverse determination by DHS or</p>	

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	<p>an immigration judge (or by the expiration of an I-94) because such a determination actively puts the student on notice that he or she was no longer authorized to stay and/or work in the U.S., and should depart immediately. The calculation under this proposed memo will put students in a position to have possibly accrued several months of unlawful presence unknowingly. It is further exacerbated by the fact that their accrual of unlawful presence may have been endorsed by their school's DSO, the main immigration-related official that most of the students have any contact with and on whom they rely. The application of the proposed memo will unfairly penalize students who have acted in good faith, who timely applied for work authorization that was made available to them, and acted according to the policies in effect at the time. It will affect their ability to apply for any other nonimmigrant visa in the U.S., as well as prevent them from applying for a visa at a consulate abroad due to the inadmissibility bar.</p> <p>As an employer of these recent graduates, the implementation of this memo will also adversely affect our business, as we have invested in training them during their OPT period and have sponsored them for their H-1B visa. Our company likewise acted in good faith in employing them pursuant to their Employment Authorization Documents, in training them, and in seeking to employ them further so that they can contribute to our business. Our investment in these students may be lost with the implementation of this memo if they can be found retroactively unlawfully present, with a possible years-long bar against re-entry.</p> <p>We would advocate for the continuation of the current calculation of accrual of unlawful presence for F-1 individuals, which would allow for clear notice to the F-1 student concerning a failure to maintain proper status, a clear start date for the accrual of unlawful presence, and only penalizes them with a re-entry bar if they knowingly remain in the U.S. for a significant period beyond that notice. This calculation is equitable and avoids disproportionately penalizing students and their employers who have acted in good faith, and allows the students an opportunity to remedy their visa status once they become aware of the problem.</p> <p>We urge against the implementation of this proposed policy memo. Thank you for your consideration, time, and support in this matter. Sincerely,</p> <p>Thank you.</p>	
Jane Nucup	Dear Madam or Sir:	

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<p>██████████@██████████ Immigration Advisor and International Programs Assistant, PDSO Office of International Education Randolph-Macon College ██████████ Ashland, VA ██████████ ██████████</p>	<p>I am writing to express my opposition and concerns regarding the new policy memorandum. "Accrual of Unlawful Presence and F, J, and M Nonimmigrants," posted by U.S. Citizenship and Immigration Services (USCIS) on May 11, 2018.</p> <p>Briefly stated, the new memorandum will reverse more than 20 years of USCIS practice regarding the accrual of "unlawful presence," a legal term defined under section 212(a)(9)(B)(ii) of the Immigration and Nationality Act (INA) by reference to an individual who "is present in the United States after expiration of the period of stay authorized by the Attorney General or is present in the United States without being admitted or paroled." For nonimmigrant students and exchange visitors in the F, J, and M categories, legacy Immigration and Naturalization Service (INS) and USCIS have interpreted the statutory unlawful presence provisions to require notice to the individual of a status violation prior to the commencement of the unlawful presence clock. Such notice is provided in the context of the adjudication of a request for an immigration benefit by USCIS or a determination of a status violation by an immigration judge. The USCIS guidance articulating this position states, "It must be emphasized that the accrual of unlawful presence neither begins on the date that a status violation occurs, nor on the day on which removal proceedings are initiated." [1] This longstanding policy provides certainty in determining when unlawful presence begins to accrue, which the new policy does not.</p> <p>As described in the May 11, 2018 memorandum, USCIS will now deem unlawful presence to have started accruing as of the day after the date that a status violation occurs, thus removing the critical procedural safeguard of providing notice to affected individuals that may find themselves subject to the three- and ten-year bars to admissibility. This raises serious questions regarding fundamental fairness and due process and will have a significant negative impact on the student, vocational, and exchange visitor communities.</p> <p>In recognition of the fluidity of academic programs, F, M, and J nonimmigrants are not admitted to the U.S. until a date-certain. Instead, they are admitted for the "duration of their status," or "D/S," which means the student or exchange visitor can remain in the United States as long as they maintain their nonimmigrant status. This generally means the student must maintain a full course of study or remain in the exchange program, not engage in unauthorized employment or other unauthorized activities, and complete the academic or exchange program in a timely manner or obtain an extension. What the new memorandum fails to recognize is that the question as to whether an individual has violated their nonimmigrant status is complex and nuanced. Students and exchange visitors can accidentally and unknowingly violate their status by dropping slightly below a full course of study, or by engaging in</p>	

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	<p>innocent, but unauthorized activity. For example, F-1 students are permitted to engage in work at a “qualifying on-campus job” for up to 20 hours per week while school is in session. Therefore, an F-1 student who inadvertently exceeds the 20-hour limit by just a couple of hours has technically violated his or her student status. In addition, a Designated School Official may make a good faith error in advising a student by authorizing a reduced course load that should not have been approved, thereby leading the student to unknowingly and unintentionally violate their status. This unfairness is compounded when the status violation also serves as the “trigger” for the accrual of unlawful presence by dependents of students and exchange visitors.</p> <p>Other examples include:</p> <ul style="list-style-type: none"> • The Curricular Practical Training Program (CPT), which is authorized by the Designated School Official (DSO) using vague regulatory guidelines and institutional policy which can vary by school. Would a student have violated status, and incurred unlawful presence, if the regulations and policies governing CPT were to be substantially revised, even though the student and the institution acted consistently and with every intention of adhering to the law when the student was granted CPT? • The USCIS website update (ostensibly from January 2018) concerning third-party worksite placements for F-1 students on the STEM Extension. The new content fails to appreciate that today’s workers must be mobile to meet the demands of their employers and their employer’s clients. An F-1 student can have a legitimate working relationship with his/her employer and still need to work on site for a third-party to fulfill the employer’s obligations. If the work experience is supposed to be an opportunity for the student to gain training in his/her field of study, shouldn’t the training actually reflect the reality of today’s work environment? What are the consequences for an international student who accepted work with an employer in good faith, and because of the insidious manner in which the policy was changed, is not aware of the shift in employment parameters? Is this student subject to unlawful presence? <p>USCIS states that the purpose of the new guidance is to “reduce the number of overstays” and “to improve how USCIS implements the unlawful presence ground of inadmissibility.” Unfortunately, this approach accomplishes neither of these goals and will instead unfairly punish a potentially significant portion of the student and exchange visitor population, further erode foreign student enrollments at U.S. colleges and universities, and unnecessarily damage the U.S. economy. I urge USCIS to abandon this misguided directive and to maintain the unlawful presence guidance that has been in place for decades</p>	

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	<p>and ensures that fundamental fairness is a critical component in interpreting and implementing the unlawful presence statute.</p> <p>Sincerely,</p>	
<p>Rachita Gulati [REDACTED]@[REDACTED]</p>	<p>Dear Director:</p> <p>I would like to submit the following comments in response to the USCIS Proposed Policy Memo "Accrual of Unlawful Presence and F, J, and M Nonimmigrants" (PM-602-1060), posted on May 11, 2018.</p> <p>I am an F-1 international student and my employer has recently petitioned for my H-1B work visa during the cap-subject application period in April.</p> <p>My concern with the proposed memorandum is that its new calculation of accrual of unlawful presence may jeopardize a student's ability to obtain a nonimmigrant visa from a consulate. By essentially equating unlawful presence with failure to maintain proper status, the policy memo puts an undue burden on F-1 students and penalizes them retroactively. The new calculation would render F-1 students unlawfully present dating back to the day after a failure to maintain F-1 status began, rather than from the day of an adverse decision by DHS or an immigration judge.</p> <p>This is an undue burden and disproportionate penalty on us F-1 students because the policies for maintaining proper F-1 status have not always been made uniformly clear to us, or even to our DSOs.</p> <p>As an F-1 student, I rely heavily on my school's DSO in order to maintain valid status, as he or she issues my I-20s, endorses the I-20s for work authorization, and updates my records in the SEVIS system. F-1 students may have engaged in certain employment activities with the full endorsement of their school's DSO, and issuance of an Employment Authorization Document by DHS, only to discover later that the initial grant of work authorization was improper.</p> <p>These inconsistencies are sometimes due to DSO error but are also due to DHS interpretations that may change without warning and get applied retroactively, to our detriment.</p> <p>Updates to USCIS interpretation of employer-employee relationships, for example, may retroactively invalidate an arrangement that I worked under during my OPT training period. The proposed policy memo would result in accrual of unlawful presence retroactively, during a period of time when USCIS policy was different or unclear.</p> <p>Furthermore, the extensive processing times for H-1B change of status petitions, combined with the</p>	

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	<p>suspension of premium processing for cap-subject H-1B applications, puts students like me at risk of having accrued unlawful presence for more than six months by the time USCIS has adjudicated my H-1B application and made a determination on whether I have maintained proper status. The extensive service center backlogs, suspension of premium processing, and sudden change in unlawful presence interpretation are all beyond the control of F-1 students. Under this memo, I may be determined to have unknowingly accrued several months of unlawful presence, and a possible 3- or 10-year bar against re-entry, without having possessed the intent to do so, and without any means to remedy my situation once I become aware of it.</p> <p>The accrual of unlawful presence calculation is currently linked to an adverse determination by DHS or an immigration judge (or by the expiration of an I-94) because such a determination actively puts the student on notice that he or she was no longer authorized to stay and/or work in the U.S., and should depart immediately. The calculation under this proposed memo will put students like me in a position to have possibly accrued several months of unlawful presence unknowingly. It is further exacerbated by the fact that their accrual of unlawful presence may have been endorsed by my school's DSO, the main immigration-related official that I have any contact with and on whom I rely. The application of the proposed memo will unfairly penalize students like me who have acted in good faith, who timely applied for work authorization, and acted according to the policies in effect at the time. It will affect our ability to apply for any other nonimmigrant visa in the U.S., as well as prevent us from applying for a visa at a consulate abroad due to the inadmissibility bar.</p> <p>It is not my intention to overstay my visa or to be unlawfully present in the U.S. I have come to study in the U.S. in order to gain a higher education in America's universities, and to supplement my education through hands-on work experience. My intention is to do so by complying with the relevant immigration regulations and policies. However, when those policies are not always clear, and my studies or work experience are being endorsed by the school's DSO, I feel I should not be penalized retroactively when I have acted in good faith and am informed later that there was a problem with my maintenance of status. I would advocate for the continuation of the current calculation of accrual of unlawful presence for F-1 individuals, which would allow for clear notice to the F-1 student concerning a failure to maintain proper status, a clear start date for the accrual of unlawful presence, and application of a re-entry bar only after remaining in the U.S. for a significant period beyond that notice. This calculation is equitable and avoids disproportionately penalizing students who have acted in good faith, and would allow us an opportunity to remedy our visa status once we become aware of the problem by being able to depart the U.S. as soon as we become aware that unlawful presence has begun to accrue.</p> <p>I urge against the implementation of this proposed policy memo. Thank you for your consideration.</p>	

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	time, and support in this matter.	
Shuyi Shen [REDACTED]@[REDACTED]	<p>Sincerely</p> <p>Hi there,</p> <p>According to the current Immigration and Naturalization Service (INS) policy, which has been in place for over 20 years, and as explained in the May 10 USCIS policy memorandum, "Accrual of Unlawful Presence and F, J, and M Nonimmigrants":</p> <p>"... foreign students and exchange visitors (F and J nonimmigrants, respectively) who were admitted for, or present in the United States in, duration of status (D/S) started accruing unlawful presence on the day after USCIS formally found a nonimmigrant status violation while adjudicating a request for another immigration benefit or on the day after an immigration judge ordered the applicant excluded, deported, or removed (whether or not the decision is appealed), whichever came first. F and J nonimmigrants, and foreign vocational students (M nonimmigrants), who were admitted until a specific date (date certain) accrued unlawful presence on the day after their Form I-94 expired, on the day after USCIS formally found a nonimmigrant status violation while adjudicating a request for another immigration benefit, or on the day after an immigration judge ordered the applicant excluded, deported, or removed (whether or not the decision was appealed), whichever came first. ... Under the former [that is, current but soon to be superseded] policy, an alien admitted for duration of status who overstayed or violated such status did not immediately begin accruing a period of unlawful presence ... "</p> <p>-----</p> <p>I strongly oppose this change.</p> <p>Policy changes of this characterization, and with this unjustifiable level of abruptness, undeniably contribute to making the United States less attractive to talented foreign students. Rather than harnessing the potential of international students to move the nation forward, policies like this one chase such students to other countries with friendlier and more reasonable immigration policies.</p> <p>Thanks</p>	
Yandong Ni [REDACTED]@[REDACTED]	<p>Dear Director:</p> <p>I would like to submit the following comments in response to the USCIS Proposed Policy Memo "Accrual of Unlawful Presence and F, J, and M Nonimmigrants" (PM-602-1060), posted on May 11,</p>	

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	<p>2018.</p> <p>My concern with the proposed memorandum is that its new calculation of accrual of unlawful presence may jeopardize my ability to obtain a nonimmigrant visa from a consulate. By essentially equating unlawful presence with failure to maintain proper status, the policy memo puts an undue burden on F-1 students and penalizes them retroactively. The new calculation would render F-1 students unlawfully present dating back to the day after a failure to maintain F-1 status began, rather than from the day of an adverse decision by DHS or an immigration judge.</p> <p>This is an undue burden and disproportionate penalty on us F-1 students because the policies for maintaining proper F-1 status have not always been made uniformly clear to us, or even to our DSOs. As an F-1 student, I rely heavily on my school's DSO in order to maintain valid status, as he or she issues my I-20s, endorses the I-20s for work authorization, and updates my records in the SEVIS system. F-1 students may have engaged in certain employment activities with the full endorsement of their school's DSO, and issuance of an Employment Authorization Document by DHS, only to discover later that the initial grant of work authorization was improper.</p> <p>These inconsistencies are sometimes due to DSO error but are also due to DHS interpretations that may change without warning and get applied retroactively, to our detriment. Updates to USCIS interpretation of employer-employee relationships, for example, may retroactively invalidate an arrangement that I worked under during my OPT training period. The proposed policy memo would result in accrual of unlawful presence retroactively, during a period of time when USCIS policy was different or unclear.</p> <p>Furthermore, the extensive processing times for H-1B change of status petitions, combined with the suspension of premium processing for cap-subject H-1B applications, puts students like me at risk of having accrued unlawful presence for more than six months by the time USCIS has adjudicated my H-1B application and made a determination on whether I have maintained proper status. The extensive service center backlogs, suspension of premium processing, and sudden change in unlawful presence interpretation are all beyond the control of F-1 students. Under this memo, I may be determined to have unknowingly accrued several months of unlawful presence, and a possible 3- or 10-year bar against re-entry, without having possessed the intent to do so, and without any means to remedy my situation once I become aware of it.</p> <p>The accrual of unlawful presence calculation is currently linked to an adverse determination by DHS or an immigration judge (or by the expiration of an I-94) because such a determination actively puts the student on notice that he or she was no longer authorized to stay and/or work in the U.S., and should depart immediately. The calculation under this proposed memo will put students like me in a position to have possibly accrued several months of unlawful presence unknowingly. It is further exacerbated by the fact that their accrual of unlawful presence may have been endorsed by my school's DSO, the main</p>	

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	<p>immigration-related official that I have any contact with and on whom I rely. The application of the proposed memo will unfairly penalize students like me who have acted in good faith, who timely applied for work authorization, and acted according to the policies in effect at the time. It will affect our ability to apply for any other nonimmigrant visa in the U.S., as well as prevent us from applying for a visa at a consulate abroad due to the inadmissibility bar.</p> <p>It is not my intention to overstay my visa or to be unlawfully present in the U.S. I have come to study in the U.S. in order to gain a higher education in America's universities, and to supplement my education through hands-on work experience. My intention is to do so by complying with the relevant immigration regulations and policies. However, when those policies are not always clear, and my studies or work experience are being endorsed by the school's DSO, I feel I should not be penalized retroactively when I have acted in good faith and am informed later that there was a problem with my maintenance of status. I would advocate for the continuation of the current calculation of accrual of unlawful presence for F-1 individuals, which would allow for clear notice to the F-1 student concerning a failure to maintain proper status, a clear start date for the accrual of unlawful presence, and application of a re-entry bar only after remaining in the U.S. for a significant period beyond that notice. This calculation is equitable and avoids disproportionately penalizing students who have acted in good faith, and would allow us an opportunity to remedy our visa status once we become aware of the problem by being able to depart the U.S. as soon as we become aware that unlawful presence has begun to accrue.</p> <p>I urge against the implementation of this proposed policy memo. Thank you for your consideration, time, and support in this matter.</p> <p>Sincerely,</p>	
<p>Tracy Nakajima [REDACTED]@[REDACTED] Mount Pleasant, MI [REDACTED]</p>	<p>Dear Director Cissna:</p> <p>I would like to submit the following comments in response to the USCIS Proposed Policy Memo "Accrual of Unlawful Presence and F, J, and M Nonimmigrants" (PM-602-1060), posted on May 11, 2018. As the Primary Designated School Official (PDSO), the Director of International Student and Scholar Services at a public university and a former international student overseas during my own university studies, I am concerned that this proposal has the potential to severely, negatively impact our F and J population currently pursuing their academic programs and goals in the United States with the full intent of maintaining valid non-immigrant status.</p> <p>The changes as proposed, while misleadingly simple, are complex, far reaching and have the very real potential to mis-identify students and scholars as having failed to maintain lawful status and consequently subjecting them to the bars to re-entry to the US. I state this based on my experience advising international students and scholars and interacting with SEVIS, ICE and USCIS. Given the complexities of status, OPT/CPT regulations and the failure of DHS's own agencies to coordinate data</p>	

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	<p>correctly, our students and scholars may be unfairly subject to the bars without an opportunity to appeal decisions or correct inaccurate information. They may, in addition, be deemed to have retroactively accrued unlawful status based on interpretations of policies and regulations that were not in existence at the time they pursued the activity, such as is now evident with the new guidance on STEM OPT off-site employment.</p> <p>The proposed change in more than 20 years of policy is not necessary. As it currently stands, the system in place provides adequate notice to students/scholars when they are in violation of their status and have triggered the clock tracking unlawful presence. It also allows students the opportunity either correct inaccurate data or request a reinstatement to lawful non-immigrant status without concern of unknowingly triggering the bans to re-entry to the US. There is a clear notice to the student or scholar when unlawful presence begins when an immigration judge determining that a violation of status has been found. The proposed policy is unclear how it will impact ICE's enforcement actions while a Reinstatement request is awaiting adjudication.</p> <p>Rather than implementing the policy as describe in the memo, improve coordination of data exchange and processes between Department of Homeland Security and its sub-units and the Department of State. I also urge that regulations to this effect be submitted for notice and public comment.</p> <p>I am very disappointed that the intent of the Memo seems to be a solution to a problem that is not in existence and was developed without consultation with those who deal daily and directly with the student and scholar population and SEVIS. I strongly urge DHS to consult with the PDSO and DSO community within the US higher education community that works daily with international students and scholars and is responsible for frontline SEVIS reporting and with professional organizations such as American Immigration Lawyers Association: AILA and NAFSA: Association of International Educators.</p> <p>Thank you for the opportunity to comment.</p>	
Anupama Jetti [REDACTED]@[REDACTED]	<p>Dear Director,</p> <p>I would like to submit the following comments in response to the USCIS Proposed Policy Memo "Accrual of Unlawful Presence and F, J, and M Nonimmigrants" (PM-602-1060), posted on May 11, 2018.</p> <p>I am an F-1 international student who has recently graduated from UHCL and am working based on Optional Practical Training (OPT). My employer has recently petitioned for my H-1B work visa during the cap-subject application period in April.</p> <p>My concern with the proposed memorandum is that its new calculation of accrual of unlawful presence may jeopardize my ability to obtain a nonimmigrant visa from a consulate. By essentially equating unlawful presence with failure to maintain proper status, the policy memo puts an undue burden on F-1 students and penalizes them retroactively. The new calculation would render F-1 students unlawfully</p>	

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	<p>present dating back to the day after a failure to maintain F-1 status began, rather than from the day of an adverse decision by DHS or an immigration judge.</p> <p>This is an undue burden and disproportionate penalty on us F-1 students because the policies for maintaining proper F-1 status have not always been made uniformly clear to us, or even to our DSOs. As an F-1 student, I rely heavily on my school's DSO in order to maintain valid status, as he or she issues my I-20s, endorses the I-20s for work authorization, and updates my records in the SEVIS system. F-1 students may have engaged in certain employment activities with the full endorsement of their school's DSO, and issuance of an Employment Authorization Document by DHS, only to discover later that the initial grant of work authorization was improper.</p> <p>These inconsistencies are sometimes due to DSO error but are also due to DHS interpretations that may change without warning and get applied retroactively, to our detriment. Updates to USCIS interpretation of employer-employee relationships, for example, may retroactively invalidate an arrangement that I worked under during my OPT training period. The proposed policy memo would result in accrual of unlawful presence retroactively, during a period of time when USCIS policy was different or unclear.</p> <p>Furthermore, the extensive processing times for H-1B change of status petitions, combined with the suspension of premium processing for cap-subject H-1B applications, puts students like me at risk of having accrued unlawful presence for more than six months by the time USCIS has adjudicated my H-1B application and made a determination on whether I have maintained proper status. The extensive service center backlogs, suspension of premium processing, and sudden change in unlawful presence interpretation are all beyond the control of F-1 students. Under this memo, I may be determined to have unknowingly accrued several months of unlawful presence, and a possible 3- or 10-year bar against re-entry, without having possessed the intent to do so, and without any means to remedy my situation once I become aware of it.</p> <p>The accrual of unlawful presence calculation is currently linked to an adverse determination by DHS or an immigration judge (or by the expiration of an I-94) because such a determination actively puts the student on notice that he or she was no longer authorized to stay and/or work in the U.S., and should depart immediately. The calculation under this proposed memo will put students like me in a position to have possibly accrued several months of unlawful presence unknowingly. It is further exacerbated by the fact that their accrual of unlawful presence may have been endorsed by my school's DSO, the main immigration-related official that I have any contact with and on whom I rely. The application of the proposed memo will unfairly penalize students like me who have acted in good faith, who timely applied for work authorization, and acted according to the policies in effect at the time. It will affect our ability to apply for any other nonimmigrant visa in the U.S., as well as prevent us from applying for a visa at a consulate abroad due to the inadmissibility bar.</p>	

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<p>Deepthi [REDACTED]@ [REDACTED]</p>	<p>Dear Director:</p> <p>I would like to submit the following comments in response to the USCIS Proposed Policy Memo "Accrual of Unlawful Presence and F, J, and M Nonimmigrants" (PM-602-1060), posted on May 11, 2018.</p> <p>I am an F-1 international student who has recently graduated from International technological university and am working based on Optional Practical Training (OPT). My employer has recently petitioned for my H-1B work visa during the cap-subject application period in April.</p> <p>My concern with the proposed memorandum is that its new calculation of accrual of unlawful presence may jeopardize my ability to obtain a nonimmigrant visa from a consulate. By essentially equating unlawful presence with failure to maintain proper status, the policy memo puts an undue burden on F-1 students and penalizes them retroactively. The new calculation would render F-1 students unlawfully present dating back to the day after a failure to maintain F-1 status began, rather than from the day of an adverse decision by DHS or an immigration judge.</p> <p>This is an undue burden and disproportionate penalty on us F-1 students because the policies for maintaining proper F-1 status have not always been made uniformly clear to us, or even to our DSOs. As an F-1 student, I rely heavily on my school's DSO in order to maintain valid status, as he or she issues my I-20s, endorses the I-20s for work authorization, and updates my records in the SEVIS system. F-1 students may have engaged in certain employment activities with the full endorsement of</p>	

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	<p>their school's DSO, and issuance of an Employment Authorization Document by DHS, only to discover later that the initial grant of work authorization was improper.</p> <p>These inconsistencies are sometimes due to DSO error but are also due to DHS interpretations that may change without warning and get applied retroactively, to our detriment. Updates to USCIS interpretation of employer-employee relationships, for example, may retroactively invalidate an arrangement that I worked under during my OPT training period. The proposed policy memo would result in accrual of unlawful presence retroactively, during a period of time when USCIS policy was different or unclear.</p> <p>Furthermore, the extensive processing times for H-1B change of status petitions, combined with the suspension of premium processing for cap-subject H-1B applications, puts students like me at risk of having accrued unlawful presence for more than six months by the time USCIS has adjudicated my H-1B application and made a determination on whether I have maintained proper status. The extensive service center backlogs, suspension of premium processing, and sudden change in unlawful presence interpretation are all beyond the control of F-1 students. Under this memo, I may be determined to have unknowingly accrued several months of unlawful presence, and a possible 3- or 10-year bar against re-entry, without having possessed the intent to do so, and without any means to remedy my situation once I become aware of it.</p> <p>The accrual of unlawful presence calculation is currently linked to an adverse determination by DHS or an immigration judge (or by the expiration of an I-94) because such a determination actively puts the student on notice that he or she was no longer authorized to stay and/or work in the U.S., and should depart immediately. The calculation under this proposed memo will put students like me in a position to have possibly accrued several months of unlawful presence unknowingly. It is further exacerbated by the fact that their accrual of unlawful presence may have been endorsed by my school's DSO, the main immigration-related official that I have any contact with and on whom I rely. The application of the proposed memo will unfairly penalize students like me who have acted in good faith, who timely applied for work authorization, and acted according to the policies in effect at the time. It will affect our ability to apply for any other nonimmigrant visa in the U.S., as well as prevent us from applying for a visa at a consulate abroad due to the inadmissibility bar.</p> <p>It is not my intention to overstay my visa or to be unlawfully present in the U.S. I have come to study in the U.S. in order to gain a higher education in America's universities, and to supplement my education through hands-on work experience. My intention is to do so by complying with the relevant immigration regulations and policies. However, when those policies are not always clear, and my studies or work experience are being endorsed by the school's DSO, I feel I should not be penalized retroactively when I have acted in good faith and am informed later that there was a problem with my maintenance of status. I would advocate for the continuation of the current calculation of accrual of</p>	

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<p>Vinod Kumar Tati [REDACTED]@[REDACTED]</p>	<p>Dear Director,</p> <p>I would like to submit the following comments in response to the USCIS Proposed Policy Memo "Accrual of Unlawful Presence and F, J, and M Nonimmigrants" (PM-602-1060), posted on May 11, 2018.</p> <p>I am an F-1 international student who has recently graduated from [university] and am working based on Optional Practical Training (OPT). My employer has recently petitioned for my H-1B work visa during the cap-subject application period in April.</p> <p>My concern with the proposed memorandum is that its new calculation of accrual of unlawful presence may jeopardize my ability to obtain a nonimmigrant visa from a consulate. By essentially equating unlawful presence with failure to maintain proper status, the policy memo puts an undue burden on F-1 students and penalizes them retroactively. The new calculation would render F-1 students unlawfully present dating back to the day after a failure to maintain F-1 status began, rather than from the day of an adverse decision by DHS or an immigration judge.</p> <p>This is an undue burden and disproportionate penalty on us F-1 students because the policies for maintaining proper F-1 status have not always been made uniformly clear to us, or even to our DSOs. As an F-1 student, I rely heavily on my school's DSO in order to maintain valid status, as he or she issues my I-20s, endorses the I-20s for work authorization, and updates my records in the SEVIS system. F-1 students may have engaged in certain employment activities with the full endorsement of their school's DSO, and issuance of an Employment Authorization Document by DHS, only to discover later that the initial grant of work authorization was improper.</p>	

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Accrual of Unlawful Presence and F, J, and M Nonimmigrants

Stakeholder Comments Matrix

STAKEHOLDER/ ORGANIZATION	STAKEHOLDER COMMENTS	ORIGINATING OFFICE'S RESOLUTIONS
	<p>maintenance of status. I would advocate for the continuation of the current calculation of accrual of unlawful presence for F-1 individuals, which would allow for clear notice to the F-1 student concerning a failure to maintain proper status, a clear start date for the accrual of unlawful presence, and application of a re-entry bar only after remaining in the U.S. for a significant period beyond that notice. This calculation is equitable and avoids disproportionately penalizing students who have acted in good faith, and would allow us an opportunity to remedy our visa status once we become aware of the problem by being able to depart the U.S. as soon as we become aware that unlawful presence has begun to accrue.</p> <p>I urge against the implementation of this proposed policy memo. Thank you for your consideration, time, and support in this matter.</p> <p>Sincerely,</p>	
<p>Rohini Masarapu [REDACTED]@[REDACTED]</p>	<p>Dear Director,</p> <p>I would like to submit the following comments in response to the USCIS Proposed Policy Memo "Accrual of Unlawful Presence and F, J, and M Nonimmigrants" (PM-602-1060), posted on May 11, 2018.</p> <p>I am an F-1 international student who has recently graduated from [university] and am working based on Optional Practical Training (OPT). My employer has recently petitioned for my H-1B work visa during the cap-subject application period in April.</p> <p>My concern with the proposed memorandum is that its new calculation of accrual of unlawful presence may jeopardize my ability to obtain a nonimmigrant visa from a consulate. By essentially equating unlawful presence with failure to maintain proper status, the policy memo puts an undue burden on F-1 students and penalizes them retroactively. The new calculation would render F-1 students unlawfully present dating back to the day after a failure to maintain F-1 status began, rather than from the day of an adverse decision by DHS or an immigration judge.</p> <p>This is an undue burden and disproportionate penalty on us F-1 students because the policies for maintaining proper F-1 status have not always been made uniformly clear to us, or even to our DSOs. As an F-1 student, I rely heavily on my school's DSO in order to maintain valid status, as he or she issues my I-20s, endorses the I-20s for work authorization, and updates my records in the SEVIS system. F-1 students may have engaged in certain employment activities with the full endorsement of</p>	

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<p>Jean Robinson [REDACTED]@[REDACTED]</p>	<p>Please accept these comments to the proposed change to the accrual of unlawful presence of F, J, and M nonimmigrants.</p> <p>I have worked with international students for over 25 years and so have seen the student experience pre-SEVIS and in the current reporting environment. Because nonimmigrants in these categories are admitted for D/S, their ability to remain in the U.S. is tied to status rather than a particular date, but it is not always clear just when there is a status violation and what the start date of the violation is. Having a determination by USCIS or an immigration judge made it clear that something was indeed a violation and the date on which unlawful presence began. A change in this process will cause confusion and potentially unfairly subject someone to a three or 10 year bar.</p> <p>Some of the things that indicate a person is in legal status are outside of the student's control, such as their SEVIS record. If a school official inadvertently fails to register an initial student record or report continued registration, the SEVIS record would make it look like there was a status violation, even if they were enrolled full time and following the rules of their visa category. We have seen many SEVIS status errors due to the CLAIMS interface not properly updating SEVIS records for things like OPT approval. These are things that the student cannot control and in some cases even check to see if their information is accurate. Address reporting is another area of concern. Technically, students must report change of address within 10 days of moving to their DSO. The DSO then has 21 days to report the change. Unless a student is in OPT and has an active portal account, they would have no way of</p>	



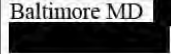
STAKEHOLDER/ ORGANIZATION	STAKEHOLDER COMMENTS	ORIGINATING OFFICE'S RESOLUTIONS
	<p>knowing whether the DSO actually made the update. Having to potentially argue later about whether they are in or out of status and subject to bars from the U.S. because their SEVIS record doesn't have proper information is unfair.</p> <p>In a case of someone who truly does violate status, there is a process for applying for reinstatement, however, for cases that have to be decided by USCIS, the time to get a decision is well over 6 months. For someone who goes through this process, if their application is denied, they would already be subject to a three year bar.</p> <p>Determining the date on which a student lost status is also not always uniform across schools since there are appeal processes and time periods for reporting in SEVIS. Take for example a student who gets academically dismissed. Most schools have a process for appeal and many advisers would not take action until the appeal process had been exhausted. If the ruling is the the student is dismissed, would the count of days of unlawful presence be taken from the date of the SEVIS termination, the date of the original dismissal or the date on which all appeals were over? These are the kinds of questions that advisers will have and will differ on how to advise students. The answers to these questions have serious consequences and put advisers who most often are not attorneys into a potential situation of being seen as practicing law without a license.</p> <p>Schools do their best to advise students on the rules, but this change would put an undue burden on school officials. Immigration law is complex and sometimes gray. Students may think they are doing everything correctly (maybe their school official even told them they were fine) and later find out that USCIS disagrees with a CPT experience or an OPT placement. Guidance on things like 3rd party placements in STEM OPT has changed and many people are still arguing on what is and is not acceptable. I know that school officials do not agree on this. This is easily a situation where if this policy change goes through, a student could find him/herself already subject to a bar at the same time they learn that they don't have status. That penalty is overly harsh.</p> <p>I urge that reconsideration of this policy be given and that what has been working continue to remain in place. Thank you.</p>	
Sanjay Kariyappa [REDACTED]@[REDACTED]	<p>Hello,</p> <p>I am writing to express my concerns regarding the policy change titled "Accrual of Unlawful Presence and F, J, and M Nonimmigrants ". Specifically I want to outline how this policy change can unfairly impact the international student community.</p>	

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	<p>One of the changes proposed is to remove the distinction between immigration status violation and unlawful presence. This is concerning due to the following reasons:</p> <ul style="list-style-type: none"> - It gives insufficient time for student to take corrective action by applying for reinstatement if the student finds himself out of status - There are factors outside a student's control that can result in a student going out of status (my case is an example of this; explained below) - USCIS has long processing times for reinstatement (13.5 months for Vermont processing center). A student who's reinstatement is denied is unfairly penalized just because of the long processing times of USCIS. This is unfair. <p>I would like to provide my own personal account of how a student can find himself out of status because of factors beyond his control and how the proposed policy change can unfairly affect such students.</p> <p>I first came to the US to pursue my Masters degree on an F1 visa. Since then I've graduated with a Masters degree and went on to work in California for 2.5 years. In 2017 I decided to quit my job and join the PhD program at The Georgia Institute of Technology in Aug 2017. Since I was granted an H1B visa in 2017, my employer told me that it would be withdrawn once I leave the company and that I could start my PhD as an F1 student. Unfortunately, my employer only filed for the withdrawal in late October. Since the H1B kicks in on October 1st, this meant that my status changed to H1B and once the withdrawal was filed I lost my status. All of this happened without my knowledge and I only recently found out that I was left without a status when I approached the office of international education. Neither my university nor my previous employer informed me of an issue with my status. Furthermore, there is no way for a student to check his/her own status online.</p> <p>On learning of this issue, I immediately applied for reinstatement of F1 status. The current processing times for the reinstatement application is more than 1 year. Given that my case is a complex one, I am not sure of the outcome. The proposed policy change would mean that I would accumulate unlawful presence just because USCIS has an unreasonably long processing time.</p> <p>It is clear from my example that the proposed policy harshly impacts students such as myself who find themselves in the unfortunate position of being out of status through no fault of their own.</p>	

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	<p>Research in STEM fields is vital for the economic growth and development of the United States. This research is in large part driven by highly motivated international students like me who strive to achieve excellence in their chosen field of study. The proposed policy change would not only harm the international student community but would impact the leadership of the US in Science and Technology.</p> <p>Thanks,</p>	
<p>Deepthi Anumakonda [REDACTED]@[REDACTED]</p>	<p>Dear Director:</p> <p>I would like to submit the following comments in response to the USCIS Proposed Policy Memo "Accrual of Unlawful Presence and F, J, and M Nonimmigrants" (PM-602-1060), posted on May 11, 2018.</p> <p>I am an F-1 international student who has recently graduated from International technological university and am working based on Optional Practical Training (OPT). My employer has recently petitioned for my H-1B work visa during the cap-subject application period in April.</p> <p>My concern with the proposed memorandum is that its new calculation of accrual of unlawful presence may jeopardize my ability to obtain a nonimmigrant visa from a consulate. By essentially equating unlawful presence with failure to maintain proper status, the policy memo puts an undue burden on F-1 students and penalizes them retroactively. The new calculation would render F-1 students unlawfully present dating back to the day after a failure to maintain F-1 status began, rather than from the day of an adverse decision by DHS or an immigration judge.</p> <p>This is an undue burden and disproportionate penalty on us F-1 students because the policies for maintaining proper F-1 status have not always been made uniformly clear to us, or even to our DSOs. As an F-1 student, I rely heavily on my school's DSO in order to maintain valid status, as he or she issues my I-20s, endorses the I-20s for work authorization, and updates my records in the SEVIS system. F-1 students may have engaged in certain employment activities with the full endorsement of their school's DSO, and issuance of an Employment Authorization Document by DHS, only to discover later that the initial grant of work authorization was improper.</p> <p>These inconsistencies are sometimes due to DSO error but are also due to DHS interpretations that may change without warning and get applied retroactively, to our detriment. Updates to USCIS interpretation of employer-employee relationships, for example, may retroactively invalidate an arrangement that I worked under during my OPT training period. The proposed policy memo would result in accrual of unlawful presence retroactively, during a period of time when USCIS policy was different or unclear.</p> <p>Furthermore, the extensive processing times for H-1B change of status petitions, combined with the suspension of premium processing for cap-subject H-1B applications, puts students like me at risk of having accrued unlawful presence for more than six months by the time USCIS has adjudicated my H-</p>	

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Rajashekar Bakki	Hello Director,	

STAKEHOLDER/ ORGANIZATION	STAKEHOLDER COMMENTS	ORIGINATING OFFICE'S RESOLUTIONS
<p>██████████@██████████ F1-OPT student</p>	<p>Am a F1 OPT student at end of my OPT period and my h1 was picked recently in lottery considering current h1 processing times it's almost taking a year if there are multiple Rfes related to the petition. So please it will be helpful for students who are under conversion and interested any useful Masters degree course to pursue Masters with cpt so this way we save our valuable time to learn some courses of our interest and get practical training in hand until our H1s approved instead of traveling back to home country and coming back which involves expenses and more importantly loss of time.</p> <p>As long we are learning and getting useful training until our H1s are approved is a very useful saves time and gives additional experience and useful learnings and will be helpful for our career perspective.</p> <p>Please consider my request and do not make pursuing new masters with CPT while a H1 picked in current lottery as illegal. As this will affect thousands of international students who are skilled and determined badly</p> <p>Regards</p>	
<p>Rizwan Mohammad ██████████@██████████</p>	<p>Hello Director,</p> <p>Am a F1 OPT student at end of my OPT period and my h1 was picked recently in lottery considering current h1 processing times it's almost taking a year if there are multiple Rfes related to the petition. So please it will be helpful for students who are under conversion and interested any useful Masters degree course to pursue Masters with cpt so this way we save our valuable time to learn some courses of our interest and get practical training in hand until our H1s approved instead of traveling back to home country and coming back which involves expenses and more importantly loss of time.</p> <p>As long we are learning and getting useful training until our H1s are approved is a very useful saves time and gives additional experience and useful learnings and will be helpful for our career perspective.</p> <p>Please consider my request and do not make pursuing new masters with CPT while a H1 picked in current lottery as illegal. As this will affect thousands of international students who are skilled and determined badly</p> <p>Regards.</p>	

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<p>Scott E. King  Director, International Students Office of International Services  Baltimore MD </p>	<p>Dear Director Cissna:</p> <p>I am sending this comment in response to the U.S. Citizenship and Immigration Services (USCIS) policy memorandum of May 10, 2018, "Accrual of Unlawful Presence and F, J, and M Nonimmigrants." The memo is a sudden and unnecessary departure from more than 20 years of policy guidance. I request that USCIS withdraw the memo and continue to operate in the long established process of evaluating unlawful presence and it has been historically determined.</p> <p>The current policy has held up for more than twenty years because it provides clear dates established in government systems, which give adequate notice to students and exchange visitors and their schools and exchange programs. It requires a clear government determination, whether it is the expiration date on a nonimmigrant's Form I-94, or a formal finding of a status violation made in the course of a DHS benefits determination or by an immigration judge, to begin the clock of unlawful presence and serves as a fair and clear warning to the alien that the clock is ticking, and he or she must take action to leave the United States or otherwise cure the status deficiency. The proposed changes require the student or scholar to have a level of knowledge of technicalities that may or may not be interpreted by government officials as losing status and thus could place the individual in jeopardy without their knowledge and ability to take corrective action.</p> <p>There also is an issue of fairness within an immigration system that is unresponsive to the point of potentially causing a loss of status. Long USCIS adjudication times, for example, may lead to someone becoming subject to the unlawful presence penalties in any case that is ultimately denied. For example, consider a student who registers for fewer classes than she should have one semester, which leads her school to terminate her SEVIS record. In good faith, the student registers for a full course of study the next semester, and applies in good faith to USCIS to reinstate her student status. It is not uncommon for a USCIS Service Center to take six months or longer to adjudicate an application for reinstatement to student status. Under current USCIS policy, if USCIS ultimately denies her reinstatement the student would start counting unlawful presence as of the date of the denial, which gives sufficient time to either make arrangements to leave the country, or possibly to ask USCIS to reconsider its decision. In the proposed policy, virtually all students whose reinstatement applications are denied would find themselves subject to at least the 3-year bar, merely because USCIS takes so long to adjudicate applications for reinstatement.</p> <p>In addition, a student or exchange visitor might not even know that he or she was in violation of status</p>	

Accrual of Unlawful Presence and F, J, and M Nonimmigrants

Stakeholder Comments Matrix

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	<p>until DHS makes a formal determination. If the unlawful presence "clock" is seen to start at some distant time in the past in such cases, any window for departing the country will have passed.</p> <p>Finally, I have concerns of this policy being applied retroactively, changing rules in mid-stay for many individuals who believed that they were following the law as enforced. For example, students on post-completion OPT were advised, following SEVP enforcement procedures, that if they exceeded unemployment days they should depart the U.S. and there was the potential for denial of future immigration benefits but not that these additional days of unemployment could cause up to a lifetime bar from reentering the U.S. To do so trivializes the our laws when they can be effectively changed to penalize individuals for actions that were not punished in the past.</p> <p>I would like to ask that USCIS leaves in place the current policy, in place for over 20 years, on determining unlawful presence for individuals admitted with "D/S" status. Should changes wish to be made, it should be done via regulations which provide for the necessary notice and comment process.</p> <p>Sincerely,</p>	
<p>Tina Rousselot de Saint Ceran [REDACTED]@[REDACTED] U.S. citizen and South Carolina resident</p>	<p>Dear Director Cissna:</p> <p>I write today in response to the U.S. Citizenship and Immigration Services (USCIS) policy memorandum of May 10, 2018, "Accrual of Unlawful Presence and F, J, and M Nonimmigrants." I recognize and appreciate the many diligent efforts the Department of Homeland Security oversees to ensure national security. I share this commitment to ensuring the U.S. remains a safe and welcoming place for all, including our international students and scholars. I am concerned that without further review and collaboration with higher education stakeholders, this policy, if enacted, will lead to unnecessary harm to students, scholars, and institutions. I ask that USCIS withdraw the memo in consideration of the concerns below and implement the recommendations outlined here.</p> <p>International students, guest researchers, and faculty bring global perspectives to our classrooms and contribute to a greater understanding of the world for our graduates. International researchers drive innovation and provide integral support for higher education engagement in economic development across the U.S. The diversity of perspectives in our classrooms, labs, and in the communities produces greater innovations in science and technology, and can strengthen understanding of world history, popular movements, and current trends and topics. International students and scholars also provide a global perspective to our students, enabling all students to gauge their competencies in the global workplace.</p>	


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	<p>In addition to the positive academic and research benefits, international students contributed \$37 billion to the U.S. economy last year and were responsible for the creation of more than 450,000 jobs. In my home state, South Carolina, 6,633 international students enrolled in higher education programs and contributed 201.8 million dollars to the South Carolina state economy and supporting 2,259 jobs (NAFSA, 2018).</p> <p>I recognize the value of international students and scholars, and recognize the additional risks and potential costs associated with implementation of this policy. As an individual who works with immigration policies in support of higher education initiatives, I rely heavily on the U.S. government to enact fair and well-executed policy decisions, policies that allow international students and scholars to pursue their goals without distractions or interruptions. I have concerns that the complexities of implementing this policy currently exceed the government's ability to effectively execute and properly inform F and J visa holders of the accrual of unlawful presence.</p> <p>Concerns:</p> <ol style="list-style-type: none"> 1. Conflation of the concepts of "failure to maintain status and unlawful presence" With the current distinction between unlawful presence and maintenance of status an exchange visitor of F student visa holder is admitted to the U.S. for the duration of status, D/S, and is not subject to unlawful presence without appropriate due process and notification from a federal judge of removal proceedings. It is possible for an F or J visa holder to fail to maintain status unknowingly and work with their institutional sponsor to take corrective action to reinstate status. Under the proposed policy change, an individual who has unknowingly violated status may not be aware of the accrual of unlawful presence, not receive adequate communication about the accrual of unlawful presence, and be subject to the 3-year, 10- year, or permanent bars on re-entry. 2. Retroactive Assignment of Unlawful Presence Accrual The proposed policy change includes a provision that would allow the USCIS to assign unlawful presence accrual retroactively. In cases where an individual unknowingly violated status, this retroactive accrual of unlawful presence could make the individual subject to re-entry bars without proper notice at the time of the status violation preventing the F or J visa holder from taking corrective action. 3. Reliance on SEVIS and other Faulty Government Databases There are routine human and machine errors in SEVIS, CLAIMS, SAVE, and other government databases. Assigning accrual of unlawful presence based on data available in these databases without due process and a holistic look at evidence could result in harm to F and J visa holders. 	

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	<p>4. Disproportionate Penalty to Infraction The accrual of unlawful presence and assignment of a re-entry bar preventing an F or J visa holder from returning to their program of study or research is a harsh penalty to impose for many of the minor infractions associated with maintaining status. Outlined below are the risks to the institution of the proposed policy change and faulty implementation:</p> <p>1. Academic Institutions recruit heavily for top academic talent from the U.S. and abroad. International students serve as research and teaching assistants to the institution assisting higher education institutions with producing global learning outcomes for all graduates to compete in a globalized 21st century workplace. International research scholars collaborate on global and local research projects and innovations. If this policy creates fear and uncertainty around studying or researching in the U.S. top academic prospects will choose to study in other countries with more supportive and attractive immigration policies. The loss of international students and research scholars in university labs and classrooms would directly affect higher education institutions' ability to prepare U.S. American students for the jobs of tomorrow, and affect universities' ability to meet the needs of economic development and research innovation today.</p> <p>1. Financial International students are an important source of revenue for higher education institutions. In addition, international students and researchers also contribute to the university's ability to secure grant funding which drives academic research and innovation. Instability and uncertainty in immigration correlates with declining international student enrollment nationwide and with the corresponding declines in tuition and fee revenues from international students.</p> <p>1. Legal The international students and research scholars that higher education institutions attract come to the U.S. to pursue academic goals and are not immigration experts. As such, the burden of ensuring international students and scholars are well informed and supported in the area of immigration falls on the institution. Many universities staff offices with knowledgeable immigration advisors able to offer guidance on maintenance of status and benefit eligibility. However, the nuanced areas of what constitutes unlawful presence is normally the domain of qualified immigration attorneys. The relationship between what legal advice is appropriate for an institution to provide to students and scholars, and what an external immigration attorney should handle will be an additional burden for institutions to manage.</p> <p>1. Reputational</p>	

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	<p>Finally, the effects of implementing a rushed policy with no formal plan or implementation strategy beyond relying on unreliable data systems, creates a situation ripe for harm to international students and scholars. In cases where international students and scholars experience challenges, higher education institutions must communicate clearly, consistently, and with certainty to maintain a positive institutional reputation with all stakeholders, including international students and scholars. Implementing this policy change without adequate technology and guidance will lead to inconsistencies in government practice and case-by-case exceptions, which in turn create communication, legal, and logistical challenges for higher education institutions.</p> <p>I request that you consider the concerns outlined above. I also support and advocate for the recommendations outlined in NAFSA's public comment on the rule linked here: http://www.nafsa.org/_/file/_/amresource/NAFSAulpcomment20180524.pdf?_ga=2.141167282.1207322518.1528131025-1858207952.1527259631</p> <p>Thank you for the opportunity to comment.</p> <p>Sincerely,</p>	
<p>Sarah Krueger [REDACTED]@[REDACTED] Sponsored Student Program Coordinator Global Programs and Strategy Alliance International Student and Scholar Services University of Minnesota [REDACTED] Minneapolis, MN Phone: [REDACTED]</p>	<p>Dear USCIS,</p> <p>I am writing in regard to the recommendations made in "Policy Memoranda: Accrual of Unlawful Presence and F, J, and M Nonimmigrants (PM-602-1060)." These proposals represent a radical change in USCIS's interpretation and application of the regulations related to the accrual of unlawful presence by those in student (F nonimmigrant), exchange visitor (J nonimmigrant), or vocational student (M nonimmigrant) status and their dependents while in the United States.</p> <p>I work at the University of Minnesota, and we have international students from more than 135 nations and faculty from across the globe. The international students, researchers, staff and faculty on our campuses bring unique experiences and perspectives to our classrooms, important ideas for discovery and innovation to our research labs, and exciting leadership to our campus community.</p> <p>As a DSO (Designated School Official) and an ARO (Alternate Responsible Officer), I was alarmed to read these proposed changes. A great deal of my daily work consists of advising international students and scholars on how to maintain their visa status (and that of their dependents). This is something that the vast majority of international students deeply and sincerely want to do, and this means they need to remain aware of visa regulations while also balancing the demands all students experience along with their institution's requirements.</p> <p>There have been significant discussions amongst DSOs and AROs since this memorandum was</p>	

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	<p>released regarding how we will assist F/J/M visa holders in understanding these new policies without inadvertently engaging in the unauthorized practice of law. While changes in regulations are to be expected, these proposed changes are especially problematic because they are a departure from the long-standing, common sense interpretation of visa regulations that has been in place for over 20 years, and it creates a system where F/J/M visa holders may be found to have violated their visa status years after the violation supposedly occurred—something that is especially troubling since this memorandum attaches the possibility that this violation could result in individuals being barred from entering the U.S. for three years, ten years, or permanently.</p> <p>Although the announcement regarding these changes comes with sufficient notice for individuals who are currently out of status to take steps to remedy their visa status before they begin accruing unlawful presence, this new interpretation will cause a great deal of uncertainty for F/J/M visa holders moving forward. Here are some specific examples of some problems DSOs/AROs foresee with the implementation of this memoranda:</p> <p>1. Recent SEVP Portal Release: SEVP recently implemented a Portal through which F-1 students on post-completion optional practical training (OPT) or STEM OPT are allowed to report changes to their personal and/or employment information, but there have been issues with the system. Students are required to report these changes with ten days, but periodic problems with SEVIS and the Portal have resulted in incomplete information being available to students and instances when students have not been able to access the Portal. Additionally, some students have been confused about what information to enter and how to correctly enter it. All of this has resulted in incomplete and inaccurate data being reported to SEVIS through the Portal despite the best efforts of F-1 visa holders to report their information. Therefore, if USCIS relies on information from SEVIS (something the Policy memo mentions as a likely source of information for making decisions about violations of status), it is likely that there will be students judged to have violated their status based on this bad data.</p> <p>While DSOs/AROs and others have been, historically, been able to help students resolve these data issues, the new interpretation of the regulations could mean that these student could be judged to have violated their status and could be accruing unlawful presence without realizing it.</p> <p>2. Changes to Regulations Causing Previously Approved Actions to Become Violations: The student and scholar visa system (SEVIS) is set up so that school officials bear a great deal of responsibility for assisting F/J/M visa holders to maintain their status. As DSOs/AROs, we do our best communicate with our students when there are changes to visa regulations and regulatory interpretations. This is not an easy task—especially when changes to regulations or regulatory</p>	

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	<p>interpretations require that we tell students something that is the reverse of what we previously correctly advised them.</p> <p>In instances like the recent announcement restricting 3rd party employment for students on STEM OPT, it is very possible students will believe that they have done everything necessary to comply with the rules, only to apply to renew a visa or to change visa status in the future and be told that their actions (permissible when they started, but now not allowed due to changes in regulatory interpretations) were a violation of their status, and they have since accrued unlawful presence, barring them from changing visa status or re-entering the U.S.</p> <p>These are only two recent examples of actions that could result in international students accruing unlawful presence despite their attempts to follow the rules. We foresee many additional problems and unintended consequences that will result from such a large and dramatic shift in regulatory interpretation.</p> <p>In conclusion</p> <p>The USCIS press release for this memorandum quotes USCIS Director L. Francis Cissna as saying, "USCIS is dedicated to our mission of ensuring the integrity of the immigration system. F, J, and M nonimmigrants are admitted to the United States for a specific purpose, and when that purpose has ended, we expect them to depart, or to obtain another, lawful immigration status." This change, however, will not contribute meaningfully to that objective. Instead, it will likely result in confusion that will mean well-meaning international students and exchange visitors could be found to have accrued unlawful presence due to innocent mistakes or misunderstandings of changing regulations. Due to the strict bars that will be applied to these individuals due to these changes, these misunderstandings could have severe consequences.</p> <p>We are at a point in time where our international students can choose to study anywhere in the world. Many international students who enroll at U.S. institutions are the best of their classes at home, and they receive offers to attend institutions around the world. They choose to come to the United States because they have determined an institution is the best option for them to pursue their chosen field of study. While here, they excel in their classes, and they provide new perspectives and experiences to their classmates and the broader university community.</p>	

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	<p>If we want to ensure the students fulfill the “specific purpose” they receive their visa (obtaining an education at a U.S. institution), we must ensure our laws and regulations are structured and implemented in a fair and transparent manner. We must work to limit uncertainty so that students can focus on learning instead of tracking constantly changing regulations. This new policy has the opposite result.</p> <p>Recommendations</p> <p>I urge you to take these concerns into consideration and rather than making the proposed changes, consider the following recommendations suggested by NAFSA (Association of International Educators):</p> <ul style="list-style-type: none"> · Leave in place the current policy, which has served for over 20 years. Neither DHS nor legacy INS ever published regulations to implement this important area of law. If the agency wishes to implement such a drastic change to longstanding common interpretation of the law, it must be done through the notice and comment process. · Do not implement any policy change until implementation has been fully coordinated with the Department of State and other DHS units such as CBP and SEVP. · Exclude from the unlawful presence count any status violations that occurred under color of law, to avoid “gotcha” scenarios, where the student reasonably relied on the authorizations granted. For example, curricular practical training authorized in SEVIS that DHS later determines may have been improperly given, should not start the unlawful presence “clock” until DHS or an immigration judge makes a formal status determination. · Apply the change of status/extension of stay tolling rules to reinstatement applications. · Expand the sections describing examples where F, M, and J nonimmigrants “do not accrue unlawful presence in certain situations.” [draft Adjudicator’s Field Manual 40.9.2(b)(1)(E)(iii)]. <p>Sincerely,</p>	
<p>Candice J. Marshall  International Student Adviser English Language Learner Instructor Center for Global Education, Earlham College</p>	<p>Dear USCIS,</p> <p>I am writing in regard to the recommendations made in “Policy Memoranda: Accrual of Unlawful Presence and F, J, and M Nonimmigrants (PM-602-1060).” These proposals represent a radical change in USCIS’s interpretation and application of the regulations related to the accrual of unlawful presence by those in student (F nonimmigrant), exchange visitor (J nonimmigrant), or vocational student (M nonimmigrant) status and their dependents while in the United States.</p>	

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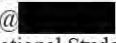
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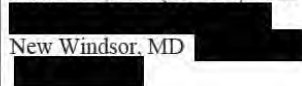
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	<p>Recommendations</p> <p>I urge you to take these concerns into consideration and rather than making the proposed changes, consider the following recommendations suggested by NAFSA (Association of International Educators):</p> <ul style="list-style-type: none"> • Leave in place the current policy, which has served for over 20 years. Neither DHS nor legacy INS ever published regulations to implement this important area of law. If the agency wishes to implement such a drastic change to longstanding common interpretation of the law, it must be done through the notice and comment process. • Do not implement any policy change until implementation has been fully coordinated with the Department of State and other DHS units such as CBP and SEVP. • Exclude from the unlawful presence count any status violations that occurred under color of law, to avoid "gotcha" scenarios, where the student reasonably relied on the authorizations granted. For example, curricular practical training authorized in SEVIS that DHS later determines may have been improperly given, should not start the unlawful presence "clock" until DHS or an immigration judge makes a formal status determination. • Apply the change of status/extension of stay tolling rules to reinstatement applications. • Expand the sections describing examples where F, M, and J nonimmigrants "do not accrue unlawful presence in certain situations." [draft Adjudicator's Field Manual 40.9.2(b)(1)(E)(iii)]. <p>Sincerely,</p>	
<p>Barbara A. Clark  Deputy Director, Center for Global Engagement Director, International Student & Scholar Services Responsible Officer,  Designated School Official, F program</p>	<p>RE: Page 10 of memo, re: reinstatement</p> <p>I strongly object to counting the unlawful presence date from a denied reinstatement case that begins when the student fell out of status. This is just not fair, considering that:</p> <ol style="list-style-type: none"> 1. The student is making an effort to rectify his/her situation by applying for reinstatement to the USCIS. In other words, the student is making a "good faith effort" to get back in status and exposing his/her situation to the government. 2. The USCIS takes around a year to make a decision, and a denial would result in the student being permanently barred from the U.S. in the future. <p>Thank you for your consideration.</p>	

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<p>Catherine Creason  Director of International Student Services, PDSO South Seattle College</p>	<p>Sincerely, To Whom It May Concern,</p> <p>I would like to provide comment to the proposed memo regarding unlawful presence as it applies to F, M, and J visa holders. It is my opinion that this proposed policy should be withdrawn.</p> <p>USCIS states that the purpose behind this proposed guidance is to “reduce the number of overstay,” however I see that this would do just the opposite, and in fact drastically increase the number of individuals in overstay within the United States. As F-1 visa holders are granted D/S, “duration of status” upon entrance to the United States, compared to a date specific exit, it allows them to transition between programs of study. Students legally remain in the United States for the time of their studies and subsequent practical training. Currently if a student falls out of status they do not begin to accrue unlawful presence unless a formal determination has been made by an immigration judge or government agency. I believe it is imperative to have the determination of unlawful presence remain consistent with the current guidance in place as it provides an important system for checks and balances. Placing this decision upon the termination authority of PDSO would raise serious concerns regarding due process.</p> <p>As explained by NAFSA: A failure to account for inconsistency among immigration documents, electronic records, and actions and events in the real world could lead to an adverse determination on status or benefit eligibility. Whether the data in documents and electronic records is being interpreted correctly, taking into account all applicable law and policy, is also a primary concern. Immigration law is complicated, and both compliance and enforcement is a very technical matter that requires training and expertise. Because of this complexity, an alien might not even know he or she is “out of status” until informed by the government.</p> <p>... Unlawful presence should only trigger when there is clear notice of remaining beyond an expiration date of authorized stay in the United States and not when there is a contestable allegation of violation of status.</p> <p>As a PDSO for a community college that is an open-enrollment institution, I assist students on a regular basis on how to apply with the United States government to regain their legal status. For over a decade I have worked personally with F-1 visa holders, which for a multitude of reasons, have fallen out of status and are actively looking to regain their legal status and complete their educational goals. Students face a tremendous amount of stress and pressure trying to understand and adjust to our culture and laws. A policy transition like the one proposed shifts our immigration policy to one that is extremely punitive</p>	


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	<p>for student visa holders, and would surely devastate our country's enrollment of international students.</p> <p>In my opinion our current government structures, for example USCIS, do not have the capacity to handle the current levels of petitions received and this level of policy chance would further flood an already broken structural system.</p> <p>There is no evidence that implementing the policy memo would accomplish the stated goal of achieving national security.</p> <p>Sincerely,</p>	
<p>Bruce A. Hake  Attorney at Law Hake Law, P.C. (formerly Hake & Schmitt)  New Windsor, MD</p>	<p>Dear Sir or Madam:</p> <p>This June 11, 2018 email is a timely comment on the referenced document.</p> <p>I have concentrated on Form I-612 J-1 hardship and persecution waiver applications for more than 25 years and have written many scholarly articles in the area. See http://www.hake.com/pc/pub.htm. Several years ago I commented on the draft Policy Manual chapter on hardship, identifying an error, and the Service accepted my suggested change.</p> <p>This comment is directed toward the sections of the referenced document that concern accrual of unlawful presence (ULP) by J-1 nonimmigrants.</p> <p>Many people, including many U.S. citizens, are going to needlessly lose their lives if the new regulations are promulgated as proposed. This is not hyperbole. I say this with absolute certainty based on handling hundreds of such cases over many years.</p> <p>I suggest that the USCIS could ameliorate this huge problem by adding the following text to the regulatory sections concerning accrual of ULP by J-1 overstays: "Notwithstanding the foregoing, a nonimmigrant who has overstayed his or her J-1 status shall not accrue unlawful presence during a period while he or she has a pending J-1 waiver application."</p> <p>Under INA 212(e), a J-1 who is subject to the two-year foreign residence requirement has a right to a waiver of that requirement under four categories. I focus on two of those categories: Form I-612 applications based on (1) exceptional hardships to a qualifying relative (a U.S. citizen or permanent resident spouse or child) or (2) a personal risk of persecution on account of race, religion, and/or</p>	

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	<p>political opinion). For many people who feel compelled to file such a waiver application, there are mortal stakes: a qualifying relative, or the applicant himself, or even the whole family, might literally be killed if some or all family members are forced to return to the home country. This danger is most commonly based on exceptionally serious medical hardship dangers to a U.S. citizen child, or where country conditions have drastically changed and the family would face an intense risk of political persecution, which in quite a few countries may include torture and death; but there are many other life-and-death situations.</p> <p>Several years ago this problem was not quite as serious as it is today, because it often took only two to six months for an I-612 to be adjudicated. But in the last 18 months processing times have drastically increased and it now routinely takes 18 months or more for an I-612 to be prepared and then adjudicated. The proposed regulation would create horrendous dilemmas for many J-1 overstay with meritorious waiver applications pending, because very many would be forced to either accrue large amounts of ULP or to put the family's lives at mortal risk.</p> <p>The problem would be especially acute for J-1 physicians sponsored by the Educational Commission for Foreign Medical Graduates (ECFMG) for graduate medical education, because they would be put in a trap. Per State Department policy, the ECFMG cannot sponsor an extension of J-1 status for the last year or more of a medical training program. Therefore, if a meritorious J-1 waiver application were to be filed soon enough to avoid the ULP problem, it would prevent the physician from completing training, which can be catastrophic to a medical career.</p> <p>I respectfully request that you make my one suggested change. I would be happy to answer any questions you may have on my comment.</p> <p>Respectfully submitted,</p>	
<p>Pavan Shah [REDACTED]@[REDACTED]</p>	<p>Dear Director:</p> <p>I would like to submit the following comments in response to the USCIS Proposed Policy Memo "Accrual of Unlawful Presence and F, J, and M Nonimmigrants" (PM-602-1060), posted on May 11, 2018.</p> <p>I am an F-1 international student who has recently graduated from San Jose State University and am working based on Optional Practical Training (OPT).</p>	

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	<p>My concern with the proposed memorandum is that its new calculation of accrual of unlawful presence may jeopardize my ability to obtain a nonimmigrant visa from a consulate. By essentially equating unlawful presence with failure to maintain proper status, the policy memo puts an undue burden on F-1 students and penalizes them retroactively. The new calculation would render F-1 students unlawfully present dating back to the day after a failure to maintain F-1 status began, rather than from the day of an adverse decision by DHS or an immigration judge.</p> <p>This is an undue burden and disproportionate penalty on us F-1 students because the policies for maintaining proper F-1 status have not always been made uniformly clear to us, or even to our DSOs. As an F-1 student, I rely heavily on my school's DSO in order to maintain valid status, as he or she issues my I-20s, endorses the I-20s for work authorization, and updates my records in the SEVIS system. F-1 students may have engaged in certain employment activities with the full endorsement of their school's DSO, and issuance of an Employment Authorization Document by DHS, only to discover later that the initial grant of work authorization was improper.</p> <p>These inconsistencies are sometimes due to DSO error but are also due to DHS interpretations that may change without warning and get applied retroactively, to our detriment. Updates to USCIS interpretation of employer-employee relationships, for example, may retroactively invalidate an arrangement that I worked under during my OPT training period. The proposed policy memo would result in accrual of unlawful presence retroactively, during a period of time when USCIS policy was different or unclear.</p> <p>Furthermore, the extensive processing times for H-1B change of status petitions, combined with the suspension of premium processing for cap-subject H-1B applications, puts students like me at risk of having accrued unlawful presence for more than six months by the time USCIS has adjudicated my H-1B application and made a determination on whether I have maintained proper status. The extensive service center backlogs, suspension of premium processing, and sudden change in unlawful presence interpretation are all beyond the control of F-1 students. Under this memo, I may be determined to have unknowingly accrued several months of unlawful presence, and a possible 3- or 10-year bar against re-entry, without having possessed the intent to do so, and without any means to remedy my situation once I become aware of it.</p> <p>The accrual of unlawful presence calculation is currently linked to an adverse determination by DHS or an immigration judge (or by the expiration of an I-94) because such a determination actively puts the student on notice that he or she was no longer authorized to stay and/or work in the U.S., and should</p>	

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	<p>depart immediately. The calculation under this proposed memo will put students like me in a position to have possibly accrued several months of unlawful presence unknowingly. It is further exacerbated by the fact that their accrual of unlawful presence may have been endorsed by my school's DSO, the main immigration-related official that I have any contact with and on whom I rely. The application of the proposed memo will unfairly penalize students like me who have acted in good faith, who timely applied for work authorization, and acted according to the policies in effect at the time. It will affect our ability to apply for any other nonimmigrant visa in the U.S., as well as prevent us from applying for a visa at a consulate abroad due to the inadmissibility bar.</p> <p>It is not my intention to overstay my visa or to be unlawfully present in the U.S. I have come to study in the U.S. in order to gain a higher education in America's universities, and to supplement my education through hands-on work experience. My intention is to do so by complying with the relevant immigration regulations and policies. However, when those policies are not always clear, and my studies or work experience are being endorsed by the school's DSO, I feel I should not be penalized retroactively when I have acted in good faith and am informed later that there was a problem with my maintenance of status. I would advocate for the continuation of the current calculation of accrual of unlawful presence for F-1 individuals, which would allow for clear notice to the F-1 student concerning a failure to maintain proper status, a clear start date for the accrual of unlawful presence, and application of a re-entry bar only after remaining in the U.S. for a significant period beyond that notice. This calculation is equitable and avoids disproportionately penalizing students who have acted in good faith, and would allow us an opportunity to remedy our visa status once we become aware of the problem by being able to depart the U.S. as soon as we become aware that unlawful presence has begun to accrue.</p> <p>I urge against the implementation of this proposed policy memo. Thank you for your consideration, time, and support in this matter.</p>	
Yushu Pu [REDACTED]@[REDACTED]	<p>Dear Director:</p> <p>I would like to submit the following comments in response to the USCIS Proposed Policy Memo "Accrual of Unlawful Presence and F, J, and M Nonimmigrants" (PM-602-1060), posted on May 11, 2018.</p> <p>I am an F-1 international student who has graduated from University of Maryland and was working based on Optional Practical Training (OPT). My employer has recently petitioned for my H-1B work visa during the cap-subject application period in April.</p> <p>My concern with the proposed memorandum is that its new calculation of accrual of unlawful presence may jeopardize my ability to obtain a nonimmigrant visa from a consulate. By essentially equating</p>	

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	<p>unlawful presence with failure to maintain proper status, the policy memo puts an undue burden on F-1 students and penalizes them retroactively. The new calculation would render F-1 students unlawfully present dating back to the day after a failure to maintain F-1 status began, rather than from the day of an adverse decision by DHS or an immigration judge.</p> <p>This is an undue burden and disproportionate penalty on us F-1 students because the policies for maintaining proper F-1 status have not always been made uniformly clear to us, or even to our DSOs. As an F-1 student, I rely heavily on my school's DSO in order to maintain valid status, as he or she issues my I-20s, endorses the I-20s for work authorization, and updates my records in the SEVIS system. F-1 students may have engaged in certain employment activities with the full endorsement of their school's DSO, and issuance of an Employment Authorization Document by DHS, only to discover later that the initial grant of work authorization was improper.</p> <p>These inconsistencies are sometimes due to DSO error but are also due to DHS interpretations that may change without warning and get applied retroactively, to our detriment. Updates to USCIS interpretation of employer-employee relationships, for example, may retroactively invalidate an arrangement that I worked under during my OPT training period. The proposed policy memo would result in accrual of unlawful presence retroactively, during a period of time when USCIS policy was different or unclear.</p> <p>Furthermore, the extensive processing times for H-1B change of status petitions, combined with the suspension of premium processing for cap-subject H-1B applications, puts students like me at risk of having accrued unlawful presence for more than six months by the time USCIS has adjudicated my H-1B application and made a determination on whether I have maintained proper status. The extensive service center backlogs, suspension of premium processing, and sudden change in unlawful presence interpretation are all beyond the control of F-1 students. Under this memo, I may be determined to have unknowingly accrued several months of unlawful presence, and a possible 3- or 10-year bar against re-entry, without having possessed the intent to do so, and without any means to remedy my situation once I become aware of it.</p> <p>The accrual of unlawful presence calculation is currently linked to an adverse determination by DHS or an immigration judge (or by the expiration of an I-94) because such a determination actively puts the student on notice that he or she was no longer authorized to stay and/or work in the U.S., and should depart immediately. The calculation under this proposed memo will put students like me in a position to have possibly accrued several months of unlawful presence unknowingly. It is further exacerbated by the fact that their accrual of unlawful presence may have been endorsed by my school's DSO, the main immigration-related official that I have any contact with and on whom I rely. The application of the proposed memo will unfairly penalize students like me who have acted in good faith, who timely applied for work authorization, and acted according to the policies in effect at the time. It will affect our</p>	

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	<p>ability to apply for any other nonimmigrant visa in the U.S., as well as prevent us from applying for a visa at a consulate abroad due to the inadmissibility bar.</p> <p>It is not my intention to overstay my visa or to be unlawfully present in the U.S. I have come to study in the U.S. in order to gain a higher education in America's universities, and to supplement my education through hands-on work experience. My intention is to do so by complying with the relevant immigration regulations and policies. However, when those policies are not always clear, and my studies or work experience are being endorsed by the school's DSO, I feel I should not be penalized retroactively when I have acted in good faith and am informed later that there was a problem with my maintenance of status. I would advocate for the continuation of the current calculation of accrual of unlawful presence for F-1 individuals, which would allow for clear notice to the F-1 student concerning a failure to maintain proper status, a clear start date for the accrual of unlawful presence, and application of a re-entry bar only after remaining in the U.S. for a significant period beyond that notice. This calculation is equitable and avoids disproportionately penalizing students who have acted in good faith, and would allow us an opportunity to remedy our visa status once we become aware of the problem by being able to depart the U.S. as soon as we become aware that unlawful presence has begun to accrue.</p> <p>I urge against the implementation of this proposed policy memo. Thank you for your consideration, time, and support in this matter.</p> <p>Sincerely,</p>	
Rebecca Greenstrom 	<p>To Whom It May Concern:</p> <p>I am writing with comments regarding the recent policy memorandum that would change the way unlawful presence is determined for F, M, and J nonimmigrants. This memo is an abrupt, radical departure from more than 20 years of policy guidance and could have severe negative repercussions for international students, the schools they attend, and the communities in which they live.</p> <p>This memo would make it incredibly difficult for an international student who has made an error to understand what that means for their status. It would also be difficult for Designated School Officials (DSOs) to advise students, given that unlawful presence is an area that has typically been the purview of USCIS and immigration attorneys.</p> <p>Currently a student who accidentally violates their immigration status has the option to apply for reinstatement through USCIS. This process allows the opportunity for the student to potentially regain valid F-1 status if USCIS agrees that such reinstatement is warranted. Unfortunately the current application processing time for reinstatement applications is 6-12 months. Under this new policy</p>	

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	<p>memo, any student who applies for reinstatement and is denied would automatically be subject to a bar and would be unable to continue their studies in the U.S. Similarly, a student who participates in OPT and is found several years later to have not complied with all provisions would suddenly be barred from the US with no warning.</p> <p>Policies like this create a chilling environment for those who wish to study or do research in the United States. It is imperative to our diplomatic and economic success as a country that we continue to attract the best and brightest from around the world. International students and scholars bring important innovation to our communities and our country. They also contribute billions of dollars to the US economy each year, and they are some of our top inventors and entrepreneurs. Policies like this one dissuade talented individuals from coming to the US.</p> <p>Given the important role that international students and scholars play in our educational and economic success as well as the fact that this policy would create an undue hardship for some international students and scholars, I respectfully request that USCIS not implement the policy outlined in the memo. Thank you for your time and consideration.</p> <p>Best regards,</p>	
<p>Carol Myint [REDACTED] Minneapolis, MN [REDACTED]</p>	<p>Dear USCIS,</p> <p>I am writing in regard to the recommendations made in "Policy Memoranda: Accrual of Unlawful Presence and F, J, and M Nonimmigrants (PM-602-1060)." These proposals represent a radical change in USCIS's interpretation and application of the regulations related to the accrual of unlawful presence by those in student (F nonimmigrant), exchange visitor (J nonimmigrant), or vocational student (M nonimmigrant) status and their dependents while in the United States.</p> <p>I work at the University of Minnesota, and we have international students from more than 135 nations and faculty from across the globe. The international students, researchers, staff and faculty on our campuses bring unique experiences and perspectives to our classrooms, important ideas for discovery and innovation to our research labs, and exciting leadership to our campus community.</p> <p>As a DSO (Designated School Official)/ARO (Alternate Responsible Officer), I was alarmed to read these proposed changes. A great deal of my daily work consists of advising international students and scholars on how to maintain their visa status (and that of their dependents). This is something that the</p>	



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	<p>vast majority of international students deeply and sincerely want to do, and this means they need to remain aware of visa regulations while also balancing the demands all students experience along with their institution's requirements.</p> <p>There have been significant discussions amongst DSOs and AROs since this memorandum was released regarding how we will assist F/J/M visa holders in understanding these new policies without inadvertently engaging in the unauthorized practice of law. While changes in regulations are to be expected, these proposed changes are especially problematic because they are a departure from the long-standing, common sense interpretation of visa regulations that has been in place for over 20 years, and it creates a system where F/J/M visa holders may be found to have violated their visa status years after the violation supposedly occurred—something that is especially troubling since this memorandum attaches the possibility that this violation could result in individuals being barred from entering the U.S. for three years, ten years, or permanently.</p> <p>Although the announcement regarding these changes comes with sufficient notice for individuals who are currently out of status to take steps to remedy their visa status before they begin accruing unlawful presence, this new interpretation will cause a great deal of uncertainty for F/J/M visa holders moving forward. Here are some specific examples of some problems DSOs/AROs foresee with the implementation of this memoranda:</p> <p>1. Recent SEVP Portal Release: SEVP recently implemented a Portal through which F-1 students on post-completion optional practical training (OPT) or STEM OPT are allowed to report changes to their personal and/or employment information, but there have been issues with the system. Students are required to report these changes with ten days, but periodic problems with SEVIS and the Portal have resulted in incomplete information being available to students and instances when students have not been able to access the Portal. Additionally, some students have been confused about what information to enter and how to correctly enter it. All of this has resulted in incomplete and inaccurate data being reported to SEVIS through the Portal despite the best efforts of F-1 visa holders to report their information. Therefore, if USCIS relies on information from SEVIS (something the Policy memo mentions as a likely source of information for making decisions about violations of status), it is likely that there will be students judged to have violated their status based on this bad data.</p> <p>While DSOs/AROs and others have been, historically, been able to help students resolve these data issues, the new interpretation of the regulations could mean that these student could be judged to have violated their status and could be be accruing unlawful presence without realizing it.</p>	

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	<p>2. Changes to Regulations Causing Previously Approved Actions to Become Violations: The student and scholar visa system (SEVIS) is set up so that school officials bear a great deal of responsibility for assisting F/J/M visa holders to maintain their status. As DSOs/AROs, we do our best communicate with our students when there are changes to visa regulations and regulatory interpretations. This is not an easy task—especially when changes to regulations or regulatory interpretations require that we tell students something that is the reverse of what we previously correctly advised them.</p> <p>In instances like the recent announcement restricting 3rd party employment for students on STEM OPT, it is very possible students will believe that they have done everything necessary to comply with the rules, only to apply to renew a visa or to change visa status in the future and be told that their actions (permissible when they started, but now not allowed due to changes in regulatory interpretations) were a violation of their status, and they have since accrued unlawful presence, barring them from changing visa status or re-entering the U.S.</p> <p>These are only two recent examples of actions that could result in international students accruing unlawful presence despite their attempts to follow the rules. We foresee many additional problems and unintended consequences that will result from such a large and dramatic shift in regulatory interpretation.</p> <p>In conclusion</p> <p>The USCIS press release for this memorandum quotes USCIS Director L. Francis Cissna as saying, “USCIS is dedicated to our mission of ensuring the integrity of the immigration system. F, J, and M nonimmigrants are admitted to the United States for a specific purpose, and when that purpose has ended, we expect them to depart, or to obtain another, lawful immigration status.” This change, however, will not contribute meaningfully to that objective. Instead, it will likely result in confusion that will mean well-meaning international students and exchange visitors could be found to have accrued unlawful presence due to innocent mistakes or misunderstandings of changing regulations. Due to the strict bars that will be applied to these individuals due to these changes, these misunderstandings could have severe consequences.</p> <p>We are at a point in time where our international students can choose to study anywhere in the world. Many international students who enroll at U.S. institutions are the best of their classes at home, and</p>	

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	<p>they receive offers to attend institutions around the world. They choose to come to the United States because they have determined an institution is the best option for them to pursue their chosen field of study. While here, they excel in their classes, and they provide new perspectives and experiences to their classmates and the broader university community.</p> <p>If we want to ensure the students fulfill the “specific purpose” they receive their visa (obtaining an education at a U.S. institution), we must ensure our laws and regulations are structured and implemented in a fair and transparent manner. We must work to limit uncertainty so that students can focus on learning instead of tracking constantly changing regulations. This new policy has the opposite result.</p> <p>Recommendations</p> <p>I urge you to take these concerns into consideration and rather than making the proposed changes, consider the following recommendations suggested by NAFSA (Association of International Educators):</p> <ul style="list-style-type: none"> • Leave in place the current policy, which has served for over 20 years. Neither DHS nor legacy INS ever published regulations to implement this important area of law. If the agency wishes to implement such a drastic change to longstanding common interpretation of the law, it must be done through the notice and comment process. • Do not implement any policy change until implementation has been fully coordinated with the Department of State and other DHS units such as CBP and SEVP. • Exclude from the unlawful presence count any status violations that occurred under color of law, to avoid “gotcha” scenarios, where the student reasonably relied on the authorizations granted. For example, curricular practical training authorized in SEVIS that DHS later determines may have been improperly given, should not start the unlawful presence “clock” until DHS or an immigration judge makes a formal status determination. • Apply the change of status/extension of stay tolling rules to reinstatement applications. • Expand the sections describing examples where F, M, and J nonimmigrants “do not accrue unlawful presence in certain situations.” [draft Adjudicator’s Field Manual 40.9.2(b)(1)(E)(iii)]. <p>Sincerely</p>	
Justin Lampley [REDACTED]@[REDACTED] Associate Director International Student	This comment is in response to the May 10, 2018 memorandum ‘Accrual of Unlawful Presence and F, J, and M Nonimmigrants’.	

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<p>Services PDSO, ARO UAB [The University of Alabama at Birmingham [REDACTED] Birmingham, AL [REDACTED] [REDACTED]</p>	<p>After reading the policy memorandum on the USCIS website, it is my belief that this new rule could unfairly punish international students for unknowingly committing a perceived status violation and create undue confusion and anxiety. Possible scenarios (unaddressed in the memo) that commonly occur are students misadvised by a DSO and who are mistakenly approved for a reduced course load or for off campus work authorization (CPT). What a DSO feels is within the F, M, and J visa regulations, could later be deemed a status violation by USCIS or an immigration judge. During that period of time, a student is unknowingly accruing unlawful presence and could be barred for a decade.</p> <p>There is also no mention of students who fall out of status and apply for reinstatement through USCIS. Will they be subject to a 3 or 10 year bar? Will a student waiting on a pending reinstatement accrue unlawful presence while waiting six months or more on an adjudication from USCIS? There is a reason the former policy has been in place for so many years. It's because there are so many 'gray' areas in regards to F-1, J-1, and M-1 immigration advising. Even DSOs who have been in the field for years (or decades) still argue over what constitutes a status violation and what doesn't in regards to off-campus work authorization, full-time employment, reduced course loads, OPT reporting, etc.</p> <p>The memo often mentions visa overstay, but that is only one obvious example of status violations (it does however vaguely mention 'unauthorized activity'). There are simply too many unforeseen pitfalls in trying to enforce this memorandum. Until there is greater guidance specifically addressing the myriad of circumstances that could constitute a status violation, the current policy should stay in place. This new policy will only cause undue confusion and anxiety with F, J, and M visa holders. The current policy rightly leaves the final determination of status violations in the hands of USCIS and US immigration judges. Once a status violation had been confirmed, only then would a student begin accruing unlawful presence.</p> <p>America's universities are one of our country's best resources, and USCIS should not be proposing policy changes like this that will deter the best and brightest from around the world from pursuing degrees and research here. It's an unnecessary step attempting to solve a non-existent problem. The previous policy is working, there is no need to repair a system that isn't broken.</p> <p>Kind Regards,</p>	
<p>Lisa Thompson mailto:[REDACTED]@[REDACTED] Director</p>	<p>Dear Madam or Sir:</p>	

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<p>International Student Services W, Lynnwood, WA</p>	<p>On behalf of the team of Designated School Officials at our institution, as well as staff who recruit and support the students in our international program, I am writing to express our opposition and concerns regarding the new policy memorandum, "Accrual of Unlawful Presence and F, J, and M Nonimmigrants," posted by U.S. Citizenship and Immigration Services (USCIS) on May 11, 2018.</p> <p>Briefly stated, the new memorandum will reverse more than 20 years of USCIS practice regarding the accrual of "unlawful presence," a legal term defined under section 212(a)(9)(B)(ii) of the Immigration and Nationality Act (INA) by reference to an individual who "is present in the United States after expiration of the period of stay authorized by the Attorney General or is present in the United States without being admitted or paroled." For nonimmigrant students and exchange visitors in the F, J, and M categories, legacy Immigration and Naturalization Service (INS) and USCIS have interpreted the statutory unlawful presence provisions to require notice to the individual of a status violation prior to the commencement of the unlawful presence clock. Such notice is provided in the context of the adjudication of a request for an immigration benefit by USCIS or a determination of a status violation by an immigration judge. The USCIS guidance articulating this position states, "It must be emphasized that the accrual of unlawful presence neither begins on the date that a status violation occurs, nor on the day on which removal proceedings are initiated." [1] This longstanding policy provides certainty in determining when unlawful presence begins to accrue, which the new policy does not.</p> <p>As described in the May 11, 2018 memorandum, USCIS will now deem unlawful presence to have started accruing as of the day after the date that a status violation occurs, thus removing the critical procedural safeguard of providing notice to affected individuals that may find themselves subject to the three- and ten-year bars to admissibility. This raises serious questions regarding fundamental fairness and due process and will have a significant negative impact on the student, vocational, and exchange visitor communities.</p> <p>In recognition of the fluidity of academic programs, F, M, and J nonimmigrants are not admitted to the U.S. until a date-certain. Instead, they are admitted for the "duration of their status," or "D/S," which means the student or exchange visitor can remain in the United States as long as they maintain their nonimmigrant status. This generally means the student must maintain a full course of study or remain in the exchange program, not engage in unauthorized employment or other unauthorized activities, and complete the academic or exchange program in a timely manner or obtain an extension. What the new memorandum fails to recognize is that the question as to whether an individual has violated their nonimmigrant status is complex and nuanced. Students and exchange visitors can accidentally and</p>	

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	<p>unknowingly violate their status by dropping slightly below a full course of study, or by engaging in innocent, but unauthorized activity. For example, F-1 students are permitted to engage in work at a "qualifying on-campus job" for up to 20 hours per week while school is in session. Therefore, an F-1 student who inadvertently exceeds the 20-hour limit by just a couple of hours has technically violated his or her student status. In addition, a Designated School Official may make a good faith error in advising a student by authorizing a reduced course load that should not have been approved, thereby leading the student to unknowingly and unintentionally violate their status. This unfairness is compounded when the status violation also serves as the "trigger" for the accrual of unlawful presence by dependents of students and exchange visitors. These scenarios represent just two possibilities which could unnecessarily punish a student who came to the United States with the full intention of studying, earning a degree (s) and returning to their home country, with the belief that our government would treat them with respect.</p> <p>USCIS states that the purpose of the new guidance is to "reduce the number of overstays" and "to improve how USCIS implements the unlawful presence ground of inadmissibility." Unfortunately, this approach accomplishes neither of these goals and will instead unfairly punish a potentially significant portion of the student and exchange visitor population, further erode foreign student enrollments at U.S. colleges and universities, and unnecessarily damage the U.S. economy. I urge USCIS to abandon this misguided directive and to maintain the unlawful presence guidance that has been in place for decades and ensures that fundamental fairness is a critical component in interpreting and implementing the unlawful presence statute.</p> <p>Sincerely,</p>	
Rebecca Wolk  @ 	<p>Dear USCIS,</p> <p>I am writing in regard to the recommendations made in "Policy Memoranda: Accrual of Unlawful Presence and F, J, and M Nonimmigrants (PM-602-1060)." These proposals represent a radical change in USCIS's interpretation and application of the regulations related to the accrual of unlawful presence by those in student (F nonimmigrant), exchange visitor (J nonimmigrant), or vocational student (M nonimmigrant) status and their dependents while in the United States.</p> <p>As a DSO (Designated School Official), I was alarmed to read these proposed changes. A great deal of my daily work consists of advising international students on how to maintain their visa status (and that of their dependents). This is something that the vast majority of international students deeply and sincerely want to do, and this means they need to remain aware of visa regulations while also balancing</p>	

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	<p>the demands all students experience along with their institution's requirements.</p> <p>There have been significant discussions amongst DSOs/AROs since this memorandum was released regarding how we will assist F/J/M visa holders in understanding these new policies without inadvertently engaging in the unauthorized practice of law. While changes in regulations are to be expected, these proposed changes are especially problematic because they are a departure from the long-standing, common sense interpretation of visa regulations that has been in place for over 20 years, and it creates a system where F/J/M visa holders may be found to have violated their visa status years after the violation supposedly occurred—something that is especially troubling since this memorandum attaches the possibility that this violation could result in individuals being barred from entering the U.S. for three years, ten years, or permanently.</p> <p>Although the announcement regarding these changes comes with sufficient notice for individuals who are currently out of status to take steps to remedy their visa status before they begin accruing unlawful presence, this new interpretation will cause a great deal of uncertainty for F/J/M visa holders moving forward. Here are some specific examples of some problems DSOs/AROs foresee with the implementation of this memoranda:</p> <ol style="list-style-type: none"> Recent SEVP Portal Release: SEVP recently implemented a Portal through which F-1 students on post-completion optional practical training (OPT) or STEM OPT are allowed to report changes to their personal and/or employment information, but there have been issues with the system. Students are required to report these changes with ten days, but periodic problems with SEVIS and the Portal have resulted in incomplete information being available to students and instances when students have not been able to access the Portal. Additionally, some students have been confused about what information to enter and how to correctly enter it. All of this has resulted in incomplete and inaccurate data being reported to SEVIS through the Portal despite the best efforts of F-1 visa holders to report their information. Therefore, if USCIS relies on information from SEVIS (something the Policy memo mentions as a likely source of information for making decisions about violations of status), it is likely that there will be students judged to have violated their status based on this bad data. <p>While DSOs/AROs and others have been, historically, been able to help students resolve these data issues, the new interpretation of the regulations could mean that these student could be judged to have violated their status and could be accruing unlawful presence without realizing it.</p>	

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	<p>2. Changes to Regulations Causing Previously Approved Actions to Become Violations: The student and scholar visa system (SEVIS) is set up so that school officials bear a great deal of responsibility for assisting F/J/M visa holders to maintain their status. As DSOs/AROs, we do our best communicate with our students when there are changes to visa regulations and regulatory interpretations. This is not an easy task—especially when changes to regulations or regulatory interpretations require that we tell students something that is the reverse of what we previously correctly advised them.</p> <p>In instances like the recent announcement restricting 3rd party employment for students on STEM OPT, it is very possible students will believe that they have done everything necessary to comply with the rules, only to apply to renew a visa or to change visa status in the future and be told that their actions (permissible when they started, but now not allowed due to changes in regulatory interpretations) were a violation of their status, and they have since accrued unlawful presence, barring them from changing visa status or re-entering the U.S.</p> <p>These are only two recent examples of actions that could result in international students accruing unlawful presence despite their attempts to follow the rules. We foresee many additional problems and unintended consequences that will result from such a large and dramatic shift in regulatory interpretation.</p> <p>In conclusion</p> <p>The USCIS press release for this memorandum quotes USCIS Director L. Francis Cissna as saying, “USCIS is dedicated to our mission of ensuring the integrity of the immigration system. F, J, and M nonimmigrants are admitted to the United States for a specific purpose, and when that purpose has ended, we expect them to depart, or to obtain another, lawful immigration status.” This change, however, will not contribute meaningfully to that objective. Instead, it will likely result in confusion that will mean well-meaning international students and exchange visitors could be found to have accrued unlawful presence due to innocent mistakes or misunderstandings of changing regulations. Due to the strict bars that will be applied to these individuals due to these changes, these misunderstandings could have severe consequences.</p> <p>We are at a point in time where our international students can choose to study anywhere in the world. Many international students who enroll at U.S. institutions are the best of their classes at home, and</p>	

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	<p>they receive offers to attend institutions around the world. They choose to come to the United States because they have determined an institution is the best option for them to pursue their chosen field of study. While here, they excel in their classes, and they provide new perspectives and experiences to their classmates and the broader university community.</p> <p>If we want to ensure the students fulfill the “specific purpose” they receive their visa (obtaining an education at a U.S. institution), we must ensure our laws and regulations are structured and implemented in a fair and transparent manner. We must work to limit uncertainty so that students can focus on learning instead of tracking constantly changing regulations. This new policy has the opposite result.</p> <p>Recommendations</p> <p>I urge you to take these concerns into consideration and rather than making the proposed changes, consider the following recommendations suggested by NAFSA (Association of International Educators):</p> <ul style="list-style-type: none"> • Leave in place the current policy, which has served for over 20 years. Neither DHS nor legacy INS ever published regulations to implement this important area of law. If the agency wishes to implement such a drastic change to longstanding common interpretation of the law, it must be done through the notice and comment process. • Do not implement any policy change until implementation has been fully coordinated with the Department of State and other DHS units such as CBP and SEVP. • Exclude from the unlawful presence count any status violations that occurred under color of law, to avoid “gotcha” scenarios, where the student reasonably relied on the authorizations granted. For example, curricular practical training authorized in SEVIS that DHS later determines may have been improperly given, should not start the unlawful presence “clock” until DHS or an immigration judge makes a formal status determination. • Apply the change of status/extension of stay tolling rules to reinstatement applications. • Expand the sections describing examples where F, M, and J nonimmigrants “do not accrue unlawful presence in certain situations.” [draft Adjudicator’s Field Manual 40.9.2(b)(1)(E)(iii)]. <p>Thank you.</p>	
Marc Mejia [REDACTED]@[REDACTED] International Student Advisor	Hello USCIS, As an International Student and Scholar Advisor at Columbia University in the City of New York, the	

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<p>Columbia University, ISSO [REDACTED] New York, NY Tel. [REDACTED]</p>	<p>nation's third largest host of international students and scholars, I have concerns about the proposed unlawful presence policy change for F, J, and M visa holders.</p> <p>I agree with NAFSA: Association of International Educators when they issued their May 24 letter regarding this memorandum as "an abrupt, radical departure from more than 20 years of policy guidance."</p> <p>Please add my voice to the countless others that hope to see the U.S. maintain its greatness by staying true to its values as a welcoming nation for students, scholars, visitors, and immigrants.</p> <p>Thank you for your time and this opportunity to comment.</p> <p>Sincerely,</p>	
<p>Stephania Fernandes [REDACTED]@ [REDACTED]</p>	<p>Dear Sir/Madam:</p> <p>Last year, just five days into office after inauguration, on January 25, 2017, President Trump signed an Executive Order: Enhancing Public Safety in the Interior of the United States. In this Order President Trump has not mentioned anything about targeting immigrants who are lawfully here or for that matter even those that are illegally or undocumented like the DACA recipients or DAPA. The President's priority as per this Order focused on strict checking of illegal crossings at the borders by drug and human traffickers, and deporting criminals with serious criminal records. The President repeatedly emphasized on doing away with the Diversity Visa Lottery and Chain migrations. Out of the 50 categories of immigrants, the students may be of least threat to the internal safety of Americans. Since 9/11, there are barely any crimes committed by foreign students.</p> <p>In fact, just couple of days later, breitbart.com reported that President Trump said that he wants highly skilled immigrants to cope up with the growing economy. As President Trump's policy has consistently been 'America First', obviously in education too, his priority would be 'Degrees awarded by American Universities' over foreign degrees. In short, foreign students highly skilled studying in American universities would be preferred. In contrast to President Trump's policy, this regulation posted by USCIS denies foreign students the time to seek opportunities that President Trump talked about as reported recently by breitbart news. Foreign students invest money in the U.S. and contribute to the U.S. Economy. F-1 and F-2 spouses do not have work authorization documents to work here. So they do not take highly paid full time jobs from Americans. In contrast to foreign students, H-1B immigrants and their spouses on H-4 enter the U.S. with foreign degrees that may or may not be authentic and</p>	

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	<p>verifiable. They take entry level American jobs that can be easily done by millions of Americans that graduate from American universities every year. Hence, if at all, this regulation should have applied first to H-1B/H-4 immigrants rather than foreign students because the President's policy is hire American first. USCIS has pick and choose policies that are inconsistent policies for same categories of resident aliens with same academic qualifications. Refer Policy # PM-602-0145 in the Matter of A-T-Inc. Also in the Matter of O-A-Inc. Policy #PM-602-0144 where an Indian provisional certificate was accepted for an EB-2 position. Just for information, an Indian Bachelor's degree involves 15 years of studies as compared to 16 years of studies for an American Bachelor's degree.</p> <p>Foreign students are in the U.S. for minimum four years. They have bank accounts for transfer of funds to pay their tuition fees and for their living expenses. They enter into lease agreements and pay utility bills. Some of them have little kids attending kindergarten and primary schools. How is it even humanly possible to depart the U.S. a day after end of their program to avoid unlawful presence?</p> <p>Since April 2018, USCIS has targeted F-1 students, changed webpages, inserting new requirements in old regulations. Refer two letters one dated May 24th and the other dated May 25th that are self-explanatory sent to the USCIS Director by Esther Brimmer, Executive Director & CEO of NAFSA. Even attorneys on their websites and blogs on sites like ilw.com have criticized this regulation as draconian.</p> <p>I hope you will reconsider this regulation.</p> <p>Sincerely,</p>	
<p>Nadia Rizvi [REDACTED]@[REDACTED] Senior Compliance Adviser Columbia University [REDACTED]</p>	<p>Dear Director Cissna and USCIS Colleagues:</p> <p>I am writing in response to the U.S. Citizenship and Immigration Services (USCIS) policy memorandum of May 10, 2018, "Accrual of Unlawful Presence and F, J, and M Nonimmigrants."</p> <p>The memo is an abrupt, radical departure from more than 20 years of policy guidance. NAFSA requests that USCIS withdraw the memo and implement the recommendations provided below.</p> <p>The proposed change is operationally complex and may lead to wrongly identifying a large number of foreign students and exchange visitors as failing to maintain lawful status, thus unfairly subjecting them to the 3-year, 10-year, or permanent bars to re-entry to the United States. Like American students, international students should be allowed to</p>	

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	<p>complete their studies at their chosen institution, without the stress or fear of being deported based on an oversight of which they may not be aware.</p> <p>This memo eliminates the long-held distinction between violating immigration status and being unlawfully present in the United States. The concept of "unlawful presence" with various "clocks," "tolling" provisions, and "bars" has to this point been the purview of immigration law specialists and law school classes. Immigration policy is incredibly complex with dire consequences for violation. Foreign students, scholars, and exchange visitors are not immigration attorneys or policy professionals and it is unfair to treat them as such. Unlawful presence should only trigger when there is clear notice of remaining beyond an expiration date of authorized stay in the United States and not when there is a contestable allegation of violation of status.</p> <p>This proposal is yet another policy which makes the United States less attractive to talented international students, scholars, and exchange visitors and undoubtedly will encourage them to look elsewhere to do their groundbreaking research and build diplomatic ties. Foreign students, scholars, and exchange visitors are here to learn, and they make America safer by becoming the nation's best ambassadors and allies. By treating them all as criminals for minor or technical violations, we will be making America less safe and a less desirable place to study. This is contrary to our nation's values as a welcoming nation of immigrants.</p> <p>Further, USCIS may achieve the goal of reducing the number of nonimmigrants who violate immigration status or stay beyond the legally allowable period through the implementation of various policies within the sub-agencies of the Department of Homeland Security (DHS) and in collaboration with other federal agencies. These policy changes must be implemented before announcing a policy change that will apply a disproportionate punishment of the 3-year, 10-year, and permanent bars of admissibility to international students and exchange visitors and their spouses and children.</p> <p>Background</p> <p>The current policy has held up for more than twenty years because it provides bright-line dates established in government systems, which give adequate notice to students and exchange visitors and their schools and exchange programs.</p> <p>The expiration date on a Form I-94 is one such clearly established date. If an individual stays beyond that date, he or she begins to accumulate days of unlawful presence. Many status violations do not present such a bright line, particularly because there is overlap between different types of "status." For example,</p> <ul style="list-style-type: none"> • Visa status (the validity period of the nonimmigrant visa in your passport) 	




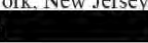
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	<ul style="list-style-type: none"> • SEVIS status (the draft, initial, active, completed, deactivated, or terminated status of a nonimmigrant's electronic record in the Student and Exchange Visitor Information System database) • Nonimmigrant status (abiding by the duration and other conditions of the nonimmigrant category in which an alien is admitted to the United States by DHS) <p>DHS now proposes to directly equate a violation of nonimmigrant status accorded under INA 214, with the start of counting days of unlawful presence under INA 212(a)(9)(B). While an alien who violates his or her nonimmigrant status is certainly removable, the policy in place for the last 20 years that distinguishes between status violations and unlawful presence makes sense for purposes of applying INA 212(a)(9)(B), from both legal and public policy viewpoints. A clear government determination, whether it is the expiration date on a nonimmigrant's Form I-94, or a formal finding of a status violation made in the course of a DHS benefits determination or by an immigration judge, serves as a fair and clear warning to an alien that the clock is ticking, and he or she must take action to leave the United States or otherwise cure the status deficiency. An alien who persists after such fair notice, must face the possibility of not being able to return to the United States for either 3 or 10 years.</p> <p>Complexity</p> <p>INA 214(a)(1) provides that, "admission to the United States of any alien as a nonimmigrant shall be for such time and under such conditions as the Attorney General [DHS Secretary] may by regulations prescribe..."</p> <p>Nonimmigrant status is a legal condition, not a physical thing. It is also dynamic, not static, which means that a person's nonimmigrant status must be acquired and maintained, and can be changed, or lost, and in some circumstances, reinstated. In many respects, nonimmigrant status is a relationship with the U.S. immigration system, with actions, events, and data in the "real" world contributing to the acquisition and maintenance, change, loss, or restoration, of the nonimmigrant relationship.</p> <p>These actions, events, and data are often recorded and presented in relation to one another in the form of physical and electronic documents and records. Documents and electronic records only point to immigration status, though; they do not stand in the place of it. In this sense, the various documents associated with a nonimmigrant status, and the data contained in databases associated with that status, should be viewed as indicators of nonimmigrant status. If all documents and electronic records are consistent, their reliability as indicators of immigration status is high. However, these documents and records reflect only a snapshot in time, they reflect only some, not all, actions, events, and</p>	

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	<p>data, and they are subject to both machine and human error.</p> <p>A failure to account for inconsistency among immigration documents, electronic records, and actions and events in the real world could lead to an adverse determination on status or benefit eligibility. Whether the data in documents and electronic records is being interpreted correctly, taking into account all applicable law and policy, is also a primary concern.</p> <p>Immigration law is complicated, and both compliance and enforcement is a very technical matter that requires training and expertise. Because of this complexity, an alien might not even know he or she is "out of status" until informed by the government.</p> <p>Fairness</p> <p>Because the INA 212(a)(9)(B) penalties are so severe, we must also weigh the fairness of the policies enforcing that law. Long USCIS adjudication times, for example, may lead to someone becoming subject to the unlawful presence penalties in any case that is ultimately denied. For example, consider a student who registers for fewer classes than she should have one semester, which leads her school to terminate her SEVIS record. In good faith, the student registers for a full course of study the next semester, and applies in good faith to USCIS to reinstate her student status. It is not uncommon for a USCIS Service Center to take six months or longer to adjudicate an application for reinstatement to student status.</p> <p>Under current USCIS policy, if USCIS ultimately denies her reinstatement the student would start counting unlawful presence as of the date of the denial, which gives sufficient time to either make arrangements to leave the country, or possibly to ask USCIS to reconsider its decision. In the proposed policy, virtually all students whose reinstatement applications are denied would find themselves subject to at least the 3-year bar, merely because USCIS takes so long to adjudicate applications for reinstatement.</p> <p>In addition, a student or exchange visitor might not even know that he or she was in violation of status until DHS makes a formal determination of that. If the unlawful presence "clock" is seen to start at some distant time in the past in such cases, any window for departing the country will have passed.</p> <p>Interagency Coordination</p> <p>There is no indication that USCIS has adequately coordinated implementation of this extreme policy shift with other government stakeholders, including the Department of State (including the Visa Office and the Bureau of Education and Cultural Affairs' Exchange Visitor Program), and other divisions of DHS, such as Immigration and Customs Enforcement (ICE), the Student and Exchange Visitor Program (SEVP).</p>	

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	<p>and Customs and Border Protection.</p> <p>Recommendations</p> <p>In lieu of implementing the policy described in the memo, NAFSA recommends the following.</p> <ul style="list-style-type: none"> • Leave in place the current policy, which has served for over 20 years. Neither DHS nor legacy INS ever published regulations to implement this important area of law. If the agency wishes to implement such a drastic change to longstanding common interpretation of the law, it must be done through the notice and comment process. • Do not implement any policy change until implementation has been fully coordinated with the Department of State and other DHS units such as CBP and SEVP. • Exclude from the unlawful presence count any status violations that occurred under color of law, to avoid “gotcha” scenarios, where the student reasonably relied on the authorizations granted. For example, curricular practical training authorized in SEVIS that DHS later determines may have been improperly given, should not start the unlawful presence “clock” until DHS or an immigration judge makes a formal status determination. • Apply the change of status/extension of stay tolling rules to reinstatement applications. • Expand the sections describing examples where F, M, and J nonimmigrants “do not accrue unlawful presence in certain situations.” [draft Adjudicator’s Field Manual 40.9.2(b)(1)(E)(iii)]. <p>Thank you for the opportunity to comment.</p> <p>Sincerely,</p>	
<p>Nina Morgenlander [REDACTED]@[REDACTED] International Student Adviser, DSO Center for Global Engagement College of Staten Island, CUNY [REDACTED] [REDACTED] Staten Island, NY [REDACTED]</p>	<p>Dear Director Cissna:</p> <p>I am writing in response to the U.S. Citizenship and Immigration Services (USCIS) policy memorandum of May 10, 2018, “Accrual of Unlawful Presence and F, J, and M Nonimmigrants.” I feel compelled to write on behalf of my students in F and J status as well as on behalf of my colleagues, who are too busy assisting students to or who are too shocked and upset about this new policy to write you themselves.</p> <p>I whole-heartedly agree with what Esther D. Brimmer, the Executive Director and CEO of NAFSA: Association of International Educators, wrote in her letter to you on the topic (which can be found at</p>	

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Rajashekar Bakki	<p>www.nafsa.org/_/file/_/amresource/NAFSAulpccomment20180524.pdf). The memo is a drastic departure from previous policy guidance and I also am requesting that USCIS withdraw the memo.</p> <p>As someone who is dedicated her adult life to assisting international students with entering the U.S. legally and maintaining their legal status, this policy, in my opinion, is a step backwards. We, DSOs and ROs, are trying to assist students to maintain their status within the parameters of the law. When they do lose their the status, we do our best to help them regain their status by counseling them on immigration law and their options. By applying for reinstatement, they are admitting their fault. (To err is human, is it not?) Then their reinstatement application is denied or approved. If denied, they (hopefully) are aware that they are supposed to leave the country and if they don't they can be arrested and forced out. With this new policy if they are denied, they may not be allowed to return to the U.S. for years active immediately as they will have accrued "unlawful presence" due to the lengthy decision process of USCIS to approve or deny reinstatements. This policy is extremely harsh as many of our students have loved ones in the U.S. and will be unable to attend important life events due to this new policy. This also will create hardships many students who have been studying in the U.S. for years and are close to the completion of their degree. As the law stands now, they may miss out on OPT if they haven't maintained their status in the last year of their studies. This seems like further punishment for students whose dream is to obtain a degree in the United States. By banning them, you are unfairly punishing them for what might be one small mistake, such as being misadvised to drop a class, or by not attending orientation and being unaware that they are not following the laws to sustain their status.</p> <p>In addition, by implementing this policy, you are sending out yet another message that foreigners are not welcome in the U.S. As it is there was a 17% drop in international students in the U.S. last year according to www.axios.com/immigrant-founders-billion-dollar-companies-15277776-206bb073-2f74-4c14-94c9-841e4d12b1ed.html. If we continue to implement these policies, these numbers will only continue to go down. This will result in less foreigners coming to the U.S. to study and/or to visit, which in turn will affect the U.S. economy overall and universities specifically, which are already experiencing financial hardship.</p> <p>This is why I implore you to leave the current policy in place. If policies must be changed, please do not implement any policy change until implementation has been fully coordinated with the Department of State and other DHS units such as CBP and SEVP. Thank you for your time and consideration.</p> <p>Sincerely Yours,</p> <p>Hello Director,</p>	

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<p>██████████@██████████</p>	<p>Am a F1 OPT student at end of my OPT period and my h1 was picked recently in lottery considering current h1 processing times it's almost taking a year if there are multiple Rfes related to the petition. So please it will be helpful for students who are under conversion and interested any useful Masters degree course to pursue Masters with cpt so this way we save our valuable time to learn some courses of our interest and get practical training in hand until our H1s approved instead of traveling back to home country and coming back which involves expenses and more importantly loss of time.</p> <p>As long we are learning and getting useful training until our H1s are approved is a very useful saves time and gives additional experience and useful learnings and will be helpful for our career perspective.</p> <p>Please consider my request and do not make pursuing new masters with CPT while a H1 picked in current lottery as illegal. As this will affect thousands of international students who are skilled and determined badly</p> <p>Regards</p>	
<p>Thomas Sirinides ██████████@██████████ Director, International Student Services PDSO RO Office of Global Services New York University ██████████ New York, NY ██████████ P: ██████████</p>	<p>To Whom It May Concern:</p> <p>I am the PDSO and RO of New York University, an institution with over 17,000 international students and some 1,200 international scholars. As such, I am deeply dismayed by what I have read in the Policy Memorandum PM-602-10660 on "Accrual of Unlawful Presence and F, J, and M Nonimmigrants". The memo represents a shocking departure from over 20 years of policy guidance.</p> <p>I strongly ask that USCIS withdraw this memo and either leave the system as it now is or implement the recommendations below.</p> <p>The presently proposed change would all too easily and all too frequently leave F, J, and M nonimmigrants subject to the 3-year, 10-year, or permanent bar on re-entry to the United States due in large part to the persistently slow processing times of USCIS in adjudicating reinstatement requests, typically 6-12 months for adjudication in recent years. Unlawful presence should not be triggered by any such process with the lack of an unclear start date for unlawful presence compounded by interminably long governmental processing times on reinstatements.</p>	

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	<p>Recommendations:</p> <ul style="list-style-type: none"> • Leave in place the current policy on duration of status for those entering the US in F, M or J status. The policy has served the nation well for over 20 years. • If DHS wishes to implement changes in the established interpretation of the law, do this only via the notice and comment process, not as now via a policy memorandum used seemingly to circumvent that prescribed process. • Exclude from the unlawful presence count any status violations that occurred where the student reasonably relied on the authorizations granted. For example, curricular practical training authorized in SEVIS that DHS later determines may have been improperly given, should not start the unlawful presence "clock" at that past date. That "clock" should only begin when DHS or an immigration judge makes a formal status determination and duly notifies the student. • It is particularly troublesome and somewhat offensive that lengthy processing times for change of status applications may contribute to an individual falling out of status and/or needing to file bridge applications to a status they do not want, due in large part to the exceedingly slow processing times of USCIS. <p>Thank you for the opportunity to comment on this policy memorandum.</p> <p>Sincerely,</p>	
<p>Esmeralda O. Famutimi Valdez  Attorney  New York, NY  New York, New Jersey, California, Beijing Phone: </p>	<p>Dear Madam or Sir:</p> <p>I am writing to express my opposition and concerns to the new policy memorandum, "Accrual of Unlawful Presence and F, J, and M Nonimmigrants," dated May 11, 2018.</p> <p>The new policy does not distinguish the differences between being unlawfully present in the US and being out of status in the US. Unlawful presence should only start when one goes beyond an expiration date and not when there is a contestable violation of status. The implementation of this policy leads to draconian repercussions as a student might not even know she or he was in violation of said status unless the DHS reaches that determination.</p> <p>I hereby affirm NAFSA's suggestions:</p> <p>- Leave in place the current policy, which has served for over 20 years. Neither DHS nor legacy INS ever published regulations to implement this important area of law. If the agency wishes to implement such a drastic change to longstanding common interpretation of the law, it must be done through the notice and comment process.</p>	

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	<p>- Do not implement any policy change until implementation has been fully coordinated with the Department of State and other DHS units such as CBP and SEVP.</p> <p>- Exclude from the unlawful presence count any status violations that occurred under color of law, to avoid "gotcha" scenarios, where the student reasonably relied on the authorizations granted. For example, curricular practical training authorized in SEVIS that DHS later determines may have been improperly given, should not start the unlawful presence "clock" until DHS or an immigration judge makes a formal status determination.</p> <p>- Apply the change of status/extension of stay tolling rules to reinstatement applications.</p> <p>- Expand the sections describing examples where F, M, and J nonimmigrants "do not accrue unlawful presence in certain situations." [draft Adjudicator's Field Manual 40.9.2(b)(1)(E)(iii)].</p> <p>Thank you for the opportunity to comment</p>	
<p>Chuck Guo, Esq. [REDACTED] Irvine, CA Office: [REDACTED]</p>	<p>To whom it may concern,</p> <p>This email is a comment submitted to a draft of Policy Memo titled "Accrual of Unlawful Presence and F, J, and M Nonimmigrants" (PM-602-1060) dated May 10, 2018. The new policy the draft sought to implement on Pages 8-10 is in violation of Due Process Clause of the U.S. Constitution, as well as unreasonable burdensome to the international commerce. I would suggest not to implement these proposed document change.</p> <p>The main difference adopted by this policy change is from the second day of an active fact-finding proceeding discovered the unauthorized activity to the second day of the unauthorized activity. This automatic trigger of 3- or 10-year bar is in direct violation of a the Due Process Clause of the Fifth Amendment, which dictates that without a fair factual-seeking proceeding, no one is subject to punishment.</p> <p>A lot of students may negligently or not intentionally violate their status without knowing such, if this</p>	



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	<p>policy were implemented. This puts an unfair burden to the international student, which is unreasonably burdensome to international commerce. U.S. universities nowadays rely on the tuition from international students. The rippling effect of this policy would limit the international student enrollment and hurt local economy.</p> <p>This policy cannot pass the economic analysis as well. It will not reduce the number of illegal immigrant at all, but will increase the sum via this burdensome regulation. It will put the already overwhelmed immigration court system into a cardiac arrest, while the immigration court would not prioritized to deporting those K-12 members or illegal immigrants with a felony record. The negative utility it would brought overshadowed its positive function.</p> <p>In conclusion, it is my opinion that this policy change should not be implemented what so ever.</p> <p>Cordially,</p>	
<p>Vera Su [REDACTED]@[REDACTED] [REDACTED] New York, NY</p>	<p>Dear Madam or Sir:</p> <p>I am writing to express my opposition and concerns regarding the new policy memorandum, "Accrual of Unlawful Presence and F, J, and M Nonimmigrants," posted by U.S. Citizenship and Immigration Services (USCIS) on May 11, 2018.</p> <p>Briefly stated, the new memorandum will reverse more than 20 years of USCIS practice regarding the accrual of "unlawful presence," a legal term defined under section 212(a)(9)(B)(ii) of the Immigration and Nationality Act (INA) by reference to an individual who "is present in the United States after expiration of the period of stay authorized by the Attorney General or is present in the United States without being admitted or paroled." For nonimmigrant students and exchange visitors in the F, J, and M categories, legacy Immigration and Naturalization Service (INS) and USCIS have interpreted the statutory unlawful presence provisions to require notice to the individual of a status violation prior to the commencement of the unlawful presence clock. Such notice is provided in the context of the adjudication of a request for an immigration benefit by USCIS or a determination of a status violation by an immigration judge. The USCIS guidance articulating this position states, "It must be emphasized that the accrual of unlawful presence neither begins on the date that a status violation occurs, nor on the day on which removal proceedings are initiated." [1] This longstanding policy provides certainty in determining when unlawful presence begins to accrue, which the new policy does not.</p>	

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	<p>As described in the May 11, 2018 memorandum, USCIS will now deem unlawful presence to have started accruing as of the day after the date that a status violation occurs, thus removing the critical procedural safeguard of providing notice to affected individuals that may find themselves subject to the three- and ten-year bars to admissibility. This raises serious questions regarding fundamental fairness and due process and will have a significant negative impact on the student, vocational, and exchange visitor communities.</p> <p>In recognition of the fluidity of academic programs, F, M, and J nonimmigrants are not admitted to the U.S. until a date-certain. Instead, they are admitted for the “duration of their status,” or “D/S,” which means the student or exchange visitor can remain in the United States as long as they maintain their nonimmigrant status. This generally means the student must maintain a full course of study or remain in the exchange program, not engage in unauthorized employment or other unauthorized activities, and complete the academic or exchange program in a timely manner or obtain an extension. What the new memorandum fails to recognize is that the question as to whether an individual has violated their nonimmigrant status is complex and nuanced. Students and exchange visitors can accidentally and unknowingly violate their status by dropping slightly below a full course of study, or by engaging in innocent, but unauthorized activity. For example, F-1 students are permitted to engage in work at a “qualifying on-campus job” for up to 20 hours per week while school is in session. Therefore, an F-1 student who inadvertently exceeds the 20-hour limit by just a couple of hours has technically violated his or her student status. In addition, a Designated School Official may make a good faith error in advising a student by authorizing a reduced course load that should not have been approved, thereby leading the student to unknowingly and unintentionally violate their status. This unfairness is compounded when the status violation also serves as the “trigger” for the accrual of unlawful presence by dependents of students and exchange visitors.</p> <p>Note 29 of the Policy Memorandum states that: Filing a reinstatement request does not by itself place the alien into a period of stay authorized and, therefore, does not stop the alien from accruing unlawful presence. If the request is ultimately denied, the F-1 nonimmigrant began to accrue unlawful presence (and is not in a period of stay authorized) the day after the alien stopped pursuing the course of study or authorized activity, unless he or she is otherwise protected from accruing unlawful presence.]</p> <p>The interpretation of “the day after the alien stopped pursuing the course of study or authorized activity” is unclear.</p> <p>For example, if a student stops full-time study at school A on June 15th, 2018 and the SEVIS record is</p>	

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	<p>terminated on the same day.</p> <p>On November 1st, 2018, School B supports student's reinstatement application within the 5 months period, and the student begins to study full-time at school B since the filing.</p> <p>On February 10th, 2019 the reinstatement application is denied by USCIS 3 months after the filing, and the student stops his full-time study at school B.</p> <p>Under this scenario, the day after the alien stopped pursuing the course of study or authorized activity is the day student stopped studying at school A or school B?</p> <p>If unfortunately the day means the day student stopped studying at school A, the student's unlawful presence will start to accrue since June 15th, 2018. It's about 8 months unlawful presence has been accrued to the date when the student receives the USCIS denial notice on February 10th, 2019. Then almost every reinstatement applicant will risk to have an accrual of over 6 months of unlawful presence once the reinstatement application gets denied.</p> <p>USCIS states that the purpose of the new guidance is to "reduce the number of overstays" and "to improve how USCIS implements the unlawful presence ground of inadmissibility." Unfortunately, this approach accomplishes neither of these goals and will instead unfairly punish a potentially significant portion of the student and exchange visitor population, further erode foreign student enrollments at U.S. colleges and universities, and unnecessarily damage the U.S. economy. I urge USCIS to abandon this misguided directive and to maintain the unlawful presence guidance that has been in place for decades and ensures that fundamental fairness is a critical component in interpreting and implementing the unlawful presence statute.</p> <p>Sincerely,</p>	
<p>Naomi Kim [REDACTED]@[REDACTED] NSK & Company, P.C. [REDACTED] Lakewood, WA Phone: [REDACTED]</p>	<p>Dear USCIS,</p> <p>I am writing to oppose the 5/10/18 USCIS Policy Memo on "Accrual of Unlawful Presence and F, J, and M Nonimmigrants" because the new policy will cause significant negative impact on student and exchange visitors who unintentionally or unknowingly violate their status in the U.S.</p> <p>As described in the May 11, 2018 memorandum, USCIS will now deem unlawful presence to have started accruing as of the day after the date that a status violation occurs, thus removing the critical</p>	

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	<p>procedural safeguard of providing notice to affected individuals that may find themselves subject to the three- and ten-year bars to admissibility. This raises serious questions regarding fundamental fairness and due process.</p> <p>Even students who are taking a full course of study and have paid all their school tuition are deemed to have violated their status if they have not extended the end date of their SEVIS I-20 before it expires. Schools are the ones that set the SEVIS I-20 end date, so students often do not realize their I-20s have expired until it is too late.</p> <p>This policy memo would essentially cause innocent status violations of this kind to serve as a "trigger" for the accrual of unlawful presence of students and exchange visitors.</p> <p>USCIS states that the purpose of the new guidance is to "reduce the number of overstay" and "to improve how USCIS implements the unlawful presence ground of inadmissibility." Unfortunately, this approach accomplishes neither of these goals and will instead unfairly punish a potentially significant portion of the student and exchange visitor population, further erode foreign student enrollments at U.S. colleges and universities, and unnecessarily damage the U.S. economy.</p> <p>I urge USCIS to abandon this misguided directive and to maintain the unlawful presence guidance that has been in place for decades and ensures that fundamental fairness is a critical component in interpreting and implementing the unlawful presence statute.</p> <p>Thank you.</p>	
<p>Navva Pothineni [REDACTED]@[REDACTED]</p>	<p>Dear Director:</p> <p>I would like to submit the following comments in response to the USCIS Proposed Policy Memo "Accrual of Unlawful Presence and F, J, and M Nonimmigrants" (PM-602-1060), posted on May 11, 2018.</p> <p>I am an F-1 international student who is currently pursuing an MBA from Westcliff University and am working based on Current Practical Training (CPT). My employer has recently petitioned for my H-1B work visa during the cap-subject application period in April.</p> <p>My concern with the proposed memorandum is that its new calculation of accrual of unlawful presence may jeopardize my ability to obtain a nonimmigrant visa from a consulate. By essentially equating</p>	

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	<p>unlawful presence with failure to maintain proper status, the policy memo puts an undue burden on F-1 students and penalizes them retroactively. The new calculation would render F-1 students unlawfully present dating back to the day after a failure to maintain F-1 status began, rather than from the day of an adverse decision by DHS or an immigration judge.</p> <p>This is an undue burden and disproportionate penalty on us F-1 students because the policies for maintaining proper F-1 status have not always been made uniformly clear to us, or even to our DSOs. As an F-1 student, I rely heavily on my school's DSO in order to maintain valid status, as he or she issues my I-20s, endorses the I-20s for work authorization, and updates my records in the SEVIS system. F-1 students may have engaged in certain employment activities with the full endorsement of their school's DSO, and issuance of an Employment Authorization Document by DHS, only to discover later that the initial grant of work authorization was improper.</p> <p>These inconsistencies are sometimes due to DSO error but are also due to DHS interpretations that may change without warning and get applied retroactively, to our detriment. Updates to USCIS interpretation of employer-employee relationships, for example, may retroactively invalidate an arrangement that I worked under during my OPT training period. The proposed policy memo would result in accrual of unlawful presence retroactively, during a period of time when USCIS policy was different or unclear.</p> <p>Furthermore, the extensive processing times for H-1B change of status petitions, combined with the suspension of premium processing for cap-subject H-1B applications, puts students like me at risk of having accrued unlawful presence for more than six months by the time USCIS has adjudicated my H-1B application and made a determination on whether I have maintained proper status. The extensive service center backlogs, suspension of premium processing, and sudden change in unlawful presence interpretation are all beyond the control of F-1 students. Under this memo, I may be determined to have unknowingly accrued several months of unlawful presence, and a possible 3- or 10-year bar against re-entry, without having possessed the intent to do so, and without any means to remedy my situation once I become aware of it.</p> <p>The accrual of unlawful presence calculation is currently linked to an adverse determination by DHS or an immigration judge (or by the expiration of an I-94) because such a determination actively puts the student on notice that he or she was no longer authorized to stay and/or work in the U.S., and should depart immediately. The calculation under this proposed memo will put students like me in a position to have possibly accrued several months of unlawful presence unknowingly. It is further exacerbated by</p>	

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	<p>the fact that their accrual of unlawful presence may have been endorsed by my school's DSO, the main immigration-related official that I have any contact with and on whom I rely. The application of the proposed memo will unfairly penalize students like me who have acted in good faith, who timely applied for work authorization, and acted according to the policies in effect at the time. It will affect our ability to apply for any other nonimmigrant visa in the U.S., as well as prevent us from applying for a visa at a consulate abroad due to the inadmissibility bar.</p> <p>It is not my intention to overstay my visa or to be unlawfully present in the U.S. I have come to study in the U.S. in order to gain a higher education in America's universities, and to supplement my education through hands-on work experience. My intention is to do so by complying with the relevant immigration regulations and policies. However, when those policies are not always clear, and my studies or work experience are being endorsed by the school's DSO, I feel I should not be penalized retroactively when I have acted in good faith and am informed later that there was a problem with my maintenance of status. I would advocate for the continuation of the current calculation of accrual of unlawful presence for F-1 individuals, which would allow for clear notice to the F-1 student concerning a failure to maintain proper status, a clear start date for the accrual of unlawful presence, and application of a re-entry bar only after remaining in the U.S. for a significant period beyond that notice. This calculation is equitable and avoids disproportionately penalizing students who have acted in good faith, and would allow us an opportunity to remedy our visa status once we become aware of the problem by being able to depart the U.S. as soon as we become aware that unlawful presence has begun to accrue.</p> <p>I urge against the implementation of this proposed policy memo. Thank you for your consideration, time, and support in this matter.</p> <p>Sincerely,</p>	
<p>Harshit Singh  Software Engineer Master's in Computer Science Illinois Institute of technology, Chicago US </p>	<p>Dear Director:</p> <p>I would like to submit the following comments in response to the USCIS Proposed Policy Memo "Accrual of Unlawful Presence and F, J, and M Nonimmigrants" (PM-602-1060), posted on May 11, 2018.</p> <p>I am an F-1 international student who has recently graduated from [university] and am working based on Optional Practical Training (OPT).</p> <p>My concern with the proposed memorandum is that its new calculation of accrual of unlawful presence may jeopardize my ability to obtain a nonimmigrant visa from a consulate. By essentially equating unlawful presence with failure to maintain proper status, the policy memo puts an undue burden on F-1</p>	

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	<p>students and penalizes them retroactively. The new calculation would render F-1 students unlawfully present dating back to the day after a failure to maintain F-1 status began, rather than from the day of an adverse decision by DHS or an immigration judge.</p> <p>This is an undue burden and disproportionate penalty on us F-1 students because the policies for maintaining proper F-1 status have not always been made uniformly clear to us, or even to our DSOs. As an F-1 student, I rely heavily on my school's DSO in order to maintain valid status, as he or she issues my I-20s, endorses the I-20s for work authorization, and updates my records in the SEVIS system. F-1 students may have engaged in certain employment activities with the full endorsement of their school's DSO, and issuance of an Employment Authorization Document by DHS, only to discover later that the initial grant of work authorization was improper.</p> <p>These inconsistencies are sometimes due to DSO error but are also due to DHS interpretations that may change without warning and get applied retroactively, to our detriment. Updates to USCIS interpretation of employer-employee relationships, for example, may retroactively invalidate an arrangement that I worked under during my OPT training period. The proposed policy memo would result in accrual of unlawful presence retroactively, during a period of time when USCIS policy was different or unclear.</p> <p>Furthermore, the extensive processing times for H-1B change of status petitions, combined with the suspension of premium processing for cap-subject H-1B applications, puts students like me at risk of having accrued unlawful presence for more than six months by the time USCIS has adjudicated my H-1B application and made a determination on whether I have maintained proper status. The extensive service center backlogs, suspension of premium processing, and sudden change in unlawful presence interpretation are all beyond the control of F-1 students. Under this memo, I may be determined to have unknowingly accrued several months of unlawful presence, and a possible 3- or 10-year bar against re-entry, without having possessed the intent to do so, and without any means to remedy my situation once I become aware of it.</p> <p>The accrual of unlawful presence calculation is currently linked to an adverse determination by DHS or an immigration judge (or by the expiration of an I-94) because such a determination actively puts the student on notice that he or she was no longer authorized to stay and/or work in the U.S., and should depart immediately. The calculation under this proposed memo will put students like me in a position to have possibly accrued several months of unlawful presence unknowingly. It is further exacerbated by the fact that their accrual of unlawful presence may have been endorsed by my school's DSO, the main immigration-related official that I have any contact with and on whom I rely. The application of the proposed memo will unfairly penalize students like me who have acted in good faith, who timely applied for work authorization, and acted according to the policies in effect at the time. It will affect our ability to apply for any other nonimmigrant visa in the U.S., as well as prevent us from applying for a</p>	

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	<p>visa at a consulate abroad due to the inadmissibility bar.</p> <p>It is not my intention to overstay my visa or to be unlawfully present in the U.S. I have come to study in the U.S. in order to gain a higher education in America's universities, and to supplement my education through hands-on work experience. My intention is to do so by complying with the relevant immigration regulations and policies. However, when those policies are not always clear, and my studies or work experience are being endorsed by the school's DSO, I feel I should not be penalized retroactively when I have acted in good faith and am informed later that there was a problem with my maintenance of status. I would advocate for the continuation of the current calculation of accrual of unlawful presence for F-1 individuals, which would allow for clear notice to the F-1 student concerning a failure to maintain proper status, a clear start date for the accrual of unlawful presence, and application of a re-entry bar only after remaining in the U.S. for a significant period beyond that notice. This calculation is equitable and avoids disproportionately penalizing students who have acted in good faith, and would allow us an opportunity to remedy our visa status once we become aware of the problem by being able to depart the U.S. as soon as we become aware that unlawful presence has begun to accrue.</p> <p>I urge against the implementation of this proposed policy memo. Thank you for your consideration, time, and support in this matter.</p> <p>Sincerely,</p>	
<p>Alison Howard-Yilmaz [REDACTED]@ [REDACTED] [REDACTED] Lexington, MA Office: [REDACTED]</p>	<p>Dear Madam or Sir:</p> <p>I am writing to express my opposition and concerns regarding the new policy memorandum, "Accrual of Unlawful Presence and F, J, and M Nonimmigrants," posted by U.S. Citizenship and Immigration Services (USCIS) on May 11, 2018.</p> <p>Briefly stated, the new memorandum will reverse more than 20 years of USCIS practice regarding the accrual of "unlawful presence," a legal term defined under section 212(a)(9)(B)(ii) of the Immigration and Nationality Act (INA) by reference to an individual who "is present in the United States after expiration of the period of stay authorized by the Attorney General or is present in the United States without being admitted or paroled." For nonimmigrant students and exchange visitors in the F, J, and M categories, legacy Immigration and Naturalization Service (INS) and USCIS have interpreted the statutory unlawful presence provisions to require notice to the individual of a status violation prior to the commencement of the unlawful presence clock. Such notice is provided in the context of the adjudication of a request for an immigration benefit by USCIS or a determination of a status violation by an immigration judge. The USCIS guidance articulating this position states, "It must be emphasized that the accrual of unlawful presence neither begins on the date that a status violation occurs, nor on the</p>	

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	<p>day on which removal proceedings are initiated.”[1] This longstanding policy provides certainty in determining when unlawful presence begins to accrue, which the new policy does not.</p> <p>As described in the May 11, 2018 memorandum, USCIS will now deem unlawful presence to have started accruing as of the day after the date that a status violation occurs, thus removing the critical procedural safeguard of providing notice to affected individuals that may find themselves subject to the three- and ten-year bars to admissibility. This raises serious questions regarding fundamental fairness and due process and will have a significant negative impact on the student, vocational, and exchange visitor communities.</p> <p>In recognition of the fluidity of academic programs, F, M, and J nonimmigrants are not admitted to the U.S. until a date-certain. Instead, they are admitted for the “duration of their status,” or “D/S,” which means the student or exchange visitor can remain in the United States as long as they maintain their nonimmigrant status. This generally means the student must maintain a full course of study or remain in the exchange program, not engage in unauthorized employment or other unauthorized activities, and complete the academic or exchange program in a timely manner or obtain an extension. What the new memorandum fails to recognize is that the question as to whether an individual has violated their nonimmigrant status is complex and nuanced. Students and exchange visitors can accidentally and unknowingly violate their status by dropping slightly below a full course of study, or by engaging in innocent, but unauthorized activity. For example, F-1 students are permitted to engage in work at a “qualifying on-campus job” for up to 20 hours per week while school is in session. Therefore, an F-1 student who inadvertently exceeds the 20-hour limit by just a couple of hours has technically violated his or her student status. In addition, a Designated School Official may make a good faith error in advising a student by authorizing a reduced course load that should not have been approved, thereby leading the student to unknowingly and unintentionally violate their status. This unfairness is compounded when the status violation also serves as the “trigger” for the accrual of unlawful presence by dependents of students and exchange visitors.</p> <p>Other examples include:</p> <ul style="list-style-type: none"> Recent SEVP Portal Updates. SEVP recently implemented a portal through which F-1 students on post-completion optional practical training (OPT) or STEM OPT are allowed to report changes to their personal and/or employment information, but there have been systematic issues with the portal. Students are required to report these changes within ten days, but periodic problems with SEVIS and the portal have resulted in incomplete information being available to students and instances when 	

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	<p>students have not been able to access the portal. Additionally, some students have been confused about what information to enter and how to correctly enter it. All of this has resulted in incomplete and inaccurate data being reported to SEVIS through the portal despite the best efforts of F-1 visa holders to report their information. Therefore, if USCIS relies on information from SEVIS (something the Policy memo mentions as a likely source of information for making decisions about violations of status), it is likely that there will be students judged to have violated their status based on this inaccurate and thus unreliable data. While DSOs/AROs and others have historically been able to help students resolve these data issues, the new interpretation of the regulations could mean that these students could be judged to have violated their status and could be accruing unlawful presence without even realizing it.</p> <p>• Institutional Authorization of Practical Training. Some institutions require curricular practical training as an integral component to the program of study. As such, in many cases, the practical training is a requirement of the program. The student has little choice but to take the required curriculum, as failing to do so, could result in the student not being fulltime. Failing to be fulltime would be a violation of their F-1 student status. USCIS is also now interpreting the meaning of practical training in a new way, reversing years of established interpretation thereby questioning the student's participation in the required practical training curriculum. In these cases, the student is properly adhering to their program of study with the practical training, however, this new memorandum coupled with this new interpretation could have the devastating effect of looking at a student's practical training history and retroactively deeming it as a violation without the student's intent or knowledge of having violated any F-1 regulations. This ex post facto situation of applying unlawful presence could have result in a permanent bar for an F-1 student who received institutional authorization for required curricular practical training.</p> <p>USCIS states that the purpose of the new guidance is to "reduce the number of overstays" and "to improve how USCIS implements the unlawful presence ground of inadmissibility." Unfortunately, this approach accomplishes neither of these goals and will instead unfairly punish a potentially significant portion of the student and exchange visitor population, further erode foreign student enrollments at U.S. colleges and universities, and unnecessarily damage the U.S. economy. I urge USCIS to abandon this misguided directive and to maintain the unlawful presence guidance that has been in place for decades and ensures that fundamental fairness is a critical component in interpreting and implementing the unlawful presence statute.</p> <p>Sincerely,</p>	

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Graduate Employees' Organization AFT-MI Local #3550, AFL-CIO [REDACTED]@[REDACTED]	<p>We oppose this proposed revision which significantly changes how unlawful presence may be determined for F, J and M visa holders.</p> <p>Although the policy memorandum suggests that this is intended to reduce overstays and unlawful presence, it is difficult to see how this will deter such behavior. Instead, the new policy will place well-intentioned international students at a risk of severe penalties for accidental / unwitting violations of status (e.g. not pursuing a full course of study, or having one's OPT or CPT retroactively deemed non-compliant.)</p> <p>Specific to our organization, this revision will impact graduate students, many of whom are living in a foreign country for the first time. Their inexperience with immigration and visa issues will make these students particularly vulnerable to deportation even if their infraction was an honest mistake. As proposed, this revision would put well-meaning international students at greater risk of deportation due to accidental or unwitting violations of status, while not deterring people who intentionally overstay or violate their status as these people already do so knowing the risks.</p> <p>The proposed revision thus places an undue burden on these visa-holders. International students who may not know of a previous violation of status will now be considered guilty not only of the original infraction, but also of overstaying their visa in the duration since that infraction.</p> <p>In so doing the revision risks alienating people who would otherwise be natural ambassadors and friends of the United States, by subjecting them to unfair and unprecedented exclusion and removal.</p> <p>Immigration law is complex, and while it is the responsibility of non-immigrant visa-holders to remain in compliance with the law, they should have the right to a fair hearing, as per current policy; they should not be deemed unlawfully present based solely on the unappealable discretion of an executive agency.</p>	
Sharvl Kammerzell [REDACTED]@[REDACTED] Director Global Services Washington State University International Programs P: [REDACTED]	<p>Dear Director Cissna:</p> <p>On behalf of Washington State University (WSU), I am writing to submit comment expressing our concern with the U.S. Citizenship and Immigration Services (USCIS) policy memorandum of May 10, 2018, "Accrual of Unlawful Presence and F, J, and M Nonimmigrants" (Unlawful Presence Memo), and to urge you to leave in place the current policy, rather than adopt the policy proposed in the Unlawful Presence Memo.</p>	

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	<p>The memo is an abrupt, radical departure from more than 20 years of policy guidance. Implementing it, as planned on August 9, 2018, would hinder efforts to attract bright minds from around the world and could create undue harm to students, their families, academic institution, state resources, and broader community interests. This is concerning to WSU because we have a significant international population made up of students and scholars, which enriches the lives of all WSU students and our entire community, by bringing the world to WSU and WSU to the world.</p> <p>The proposed change is operationally complex and may lead to unfairly identifying a large number of foreign students and exchange visitors as failing to maintain lawful status, well after the fact, thus unfairly subjecting them to the 3-year, 10-year, or even to permanent bars to re-entry to the United States, based on an oversight of which they may not be aware. Because the proposed change would start to count accrual of unlawful presence as of the day after the date the status violation occurs, rather than after notice to the individual of the status violation, individuals may not be aware of the ticking of the “unlawful presence clock” until it is too late to do anything, as they will not be aware that they are out of status.</p> <p>What the Unlawful Presence Memo fails to recognize is that the question as to whether an individual has violated their nonimmigrant status is complex and nuanced. Students and exchange visitors do not necessarily know when they fall out of status. They can accidentally and unknowingly violate their status by dropping slightly below a full course of study, or by engaging in innocent, but unauthorized activity, including volunteer activities. For example, F-1 students are permitted to engage in work at a “qualifying on-campus job” for up to 20 hours per week while school is in session. Therefore, an F-1 student who inadvertently exceeds the 20-hour limit by just a couple of hours has technically violated his or her student status. In addition, a Designated School Official may make a good faith error in advising a student by authorizing a reduced course load that should not have been approved, thereby leading the student to unknowingly and unintentionally violate their status. This unfairness is compounded when the status violation also serves as the “trigger” for the accrual of unlawful presence by dependents of students and exchange visitors.</p> <p>While an alien who violates his or her nonimmigrant status is certainly removable, the policy in place distinguishes between status violations and unlawful presence makes sense for purposes of applying INA 212(a)(9)(B), from both legal and public policy viewpoints. A clear government determination, whether it is the expiration date on a nonimmigrant’s Form I-94, or a formal finding of a status violation made in the course of a DHS benefits determination or by an immigration judge, serves as a fair and clear warning to an alien that the clock is ticking, and he or she can just take action to leave the</p>	

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	<p>United States or otherwise cure the status deficiency. An alien, who persists after such fair notice, must face the possibility of not being able to return to United States for either 3 or 10 years.</p> <p>The current policy has held up for more than 20 years because it provides bright-line dates established in government systems, which give adequate notice to students and exchange visitors and their schools and exchange programs, and an opportunity to rectify inadvertent, innocent or misconstrued errors. Replacing the current policy with the proposed policy will deprive foreign nationals of adequate notice and fundamental fairness. Such a program would make the United States less attractive to talented international students, scholars, and exchange visitors and undoubtedly will encourage them to look elsewhere to do their groundbreaking research and build diplomatic ties. Foreign students, scholars, and exchange visitors are here to learn, and they make America safer by becoming the nation's best ambassadors and allies. By treating them all as criminals for minor or technical violations, we will be making America less safe and a less desirable place to study.</p> <p>In lieu of implementing the policy described in the Unlawful Presence Memo, WSU requests that you leave in place the current policy, which has served well for over 20 years.</p> <p>Sincerely,</p>	
<p>Christina Delgado [REDACTED]@[REDACTED] Director International Student Program Irvine Valley College [REDACTED] Irvine, CA [REDACTED] Tel: [REDACTED]</p>	<p>Dear Sirs:</p> <p>I am writing to express my opposition and concerns regarding the new policy memorandum, "Accrual of Unlawful Presence and F, J, and M Nonimmigrants," posted by U.S. Citizenship and Immigration Services (USCIS) on May 11, 2018.</p> <p>Briefly stated, the new memorandum will reverse more than 20 years of USCIS practice regarding the accrual of "unlawful presence," a legal term defined under section 212(a)(9)(B)(ii) of the Immigration and Nationality Act (INA) by reference to an individual who "is present in the United States after expiration of the period of stay authorized by the Attorney General or is present in the United States without being admitted or paroled." For nonimmigrant students and exchange visitors in the F, J, and M categories, legacy Immigration and Naturalization Service (INS) and USCIS have interpreted the statutory unlawful presence provisions to require notice to the individual of a status violation prior to the commencement of the unlawful presence clock. Such notice is provided in the context of the adjudication of a request for an immigration benefit by USCIS or a determination of a status violation by an immigration judge. The USCIS guidance articulating this position states, "It must be emphasized that the accrual of unlawful presence neither begins on the date that a status violation occurs, nor on the</p>	

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	<p>day on which removal proceedings are initiated.”[1] This longstanding policy provides certainty in determining when unlawful presence begins to accrue, which the new policy does not.</p> <p>As described in the May 11, 2018 memorandum, USCIS will now deem unlawful presence to have started accruing as of the day after the date that a status violation occurs, thus removing the critical procedural safeguard of providing notice to affected individuals that may find themselves subject to the three- and ten-year bars to admissibility. This raises serious questions regarding fundamental fairness and due process and will have a significant negative impact on the student, vocational, and exchange visitor communities.</p> <p>In recognition of the fluidity of academic programs, F, M, and J nonimmigrants are not admitted to the U.S. until a date-certain. Instead, they are admitted for the “duration of their status,” or “D/S,” which means the student or exchange visitor can remain in the United States as long as they maintain their nonimmigrant status. This generally means the student must maintain a full course of study or remain in the exchange program, not engage in unauthorized employment or other unauthorized activities, and complete the academic or exchange program in a timely manner or obtain an extension.</p> <p>What the new memorandum fails to recognize is that the question as to whether an individual has violated their nonimmigrant status is complex and nuanced. Students and exchange visitors can accidentally and unknowingly violate their status by dropping slightly below a full course of study, or by engaging in innocent, but unauthorized activity. These are young students who are just like any other US college student – they do not always pay attention to the regulations and fall out of status without nefarious intent. It is simply a result of their age and lack of knowledge of the law. The proposed change to the law could have extremely negative consequences on young adults who are simply pursuing a prized American education. This serves no purpose and does NOT protect the US. In fact, it only serves to unduly penalize students and create additional negative perceptions of the US as a nation that welcomes the best and brightest to study at our institutions.</p> <p>This unfairness is compounded when the status violation also serves as the “trigger” for the accrual of unlawful presence by dependents of students and exchange visitors. Such a law could adversely impact minor children who by no means have done anything to warrant substantive bans on their ability to return to the US.</p> <p>USCIS states that the purpose of the new guidance is to “reduce the number of overstays” and “to improve how USCIS implements the unlawful presence ground of inadmissibility.” Unfortunately, this</p>	

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	<p>approach accomplishes neither of these goals and will instead unfairly punish a potentially significant portion of the student and exchange visitor population, further erode foreign student enrollments at U.S. colleges and universities, and unnecessarily damage the U.S. economy.</p> <p>I strongly urge USCIS to abandon this misguided directive and to maintain the unlawful presence guidance that has been in place for decades and ensures that fundamental fairness is a critical component in interpreting and implementing the unlawful presence statute.</p> <p>Sincerely,</p>	
<p>Ilana Smith [REDACTED]@[REDACTED] Tel [REDACTED]</p>	<p>Dear Director Cissna,</p> <p>Thank you for the opportunity to comment on the new policy memorandum, "Accrual of Unlawful Presence and F, J and M Nonimmigrants" posted by U.S. Citizenship and Immigration Services (USCIS) on May 11, 2018.</p> <p>The California Institute of Technology (Caltech) is an independent, world-renowned science and engineering Institute that marshals some of the world's brightest minds and most innovative tools to address fundamental scientific questions.</p> <p>Caltech is certified by the Department of Homeland Security (DHS), Student and Exchange Visitor Program (SEVP) to administer and issue documents in support of F students and designated by the Department of State (DOS) Exchange Visitor Program (EVP) to administer and issue documents in support of J exchange visitors.</p> <p>As an F and J program sponsor, Caltech is writing to express the following concerns regarding the new policy memorandum.</p> <p>Change in established USCIS practice regarding accrual of "unlawful presence" which provides a bright line date</p> <p>The new memorandum will reverse more than 20 years of USCIS practice regarding the accrual of "unlawful presence," a legal term defined under section 212(a)(9)(B)(ii) of the Immigration and Nationality Act (INA) by reference to an individual who "is present in the United States after expiration of the period of stay authorized by the Attorney General or is present in the United States without being admitted or paroled."</p>	

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	<p>For students and exchange visitors, legacy Immigration and Naturalization Service (INS) and USCIS have interpreted the statutory unlawful presence provisions to require notice to the individual of a status violation prior to the commencement of the unlawful presence clock. Such notice is provided in the context of the adjudication of a request for an immigration benefit by USCIS or a determination of a status violation by an immigration judge. The USCIS guidance articulating this position states, "It must be emphasized that the accrual of unlawful presence neither begins on the date that a status violation occurs, nor on the day on which removal proceedings are initiated."</p> <p>The current policy has been in place for more than twenty years because it provides bright-line dates established in government systems, which give adequate notice to students and exchange visitors and their schools and exchange programs.</p> <p>Institutions of higher education will - de facto – determine unlawful presence without training or the full record</p> <p>Designated School Officials (P/DSO) and Alternate Responsible Officers (A/RO) program sponsors are not in a position to make the critical, legal determination of unlawful presence. Program sponsors have received no guidance or training from DHS or the Department of Justice (DOJ) on how to make these complex and legally significant findings. Even with training and guidance, P/DSO and A/RO program sponsors do not have access to the student or exchange visitor's complete immigration history, which is essential to a legal determination of unlawful presence. Program sponsors can only view their program's SEVIS information; there is no access to SEVIS data transferred from another school.</p> <p>The new policy will discourage valid reinstatement applications</p> <p>A student who violates status, particularly if caused by circumstances beyond their control, may seek reinstatement from USCIS, 8 CFR § 214.2(f)(16). USCIS often takes many months to adjudicate these applications. Even when filing a timely, non-frivolous application for reinstatement, the student - not knowing if the application will be granted or denied - will now have to balance the possibility of reinstatement with the risk of denial and accruing unlawful presence, retroactive to the date of the status violation, and the ensuing imposition of the three- or ten- year bar to re-entry.</p> <p>Accidental or unknowing violation of status could result in unlawful presence</p>	

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	<p>Students and exchange visitors can accidentally and unknowingly violate their status, which would result in the accrual of unlawful presence. Examples include dropping slightly below a full course of study, engaging in an innocent, but unauthorized, activity, reporting data incorrectly in the SEVIS student portal, or engaging in previously acceptable activities that were later deemed to be in violation of their status such as the recent restriction on third party employment for students on STEM OPT.</p> <p>Furthermore, these status violations and the accrual of unlawful presence would also be attributable to the dependents of students and exchange visitors.</p> <p>Recommendations</p> <p>In light of these significant concerns, Caltech favors the recommendations submitted by NAFSA: Association of International Educators on May 24, 2018:</p> <ul style="list-style-type: none"> • Leave in place the current policy, which has served for over 20 years. Neither DHS nor legacy INS ever published regulations to implement this important area of law. If the agency wishes to implement such a drastic change to longstanding common interpretation of the law, it must be done through the notice and comment process. • Do not implement any policy change until implementation has been fully coordinated with the DOS and other DHS units such as CBP and SEVP. • Exclude from unlawful presence count any status violations that occurred under color of law, to avoid "gotcha" scenarios, where the student reasonably relied on the authorizations granted. For example, curricular practical training authorized in SEVIS that DHS later determines may have been improperly given, should not start the unlawful presence "clock" until DHS or an Immigration Judge makes a formal status determination. • Apply the change of status/extension of stay tolling rule to reinstatement applications. • Expand the sections describing where F, M, and J nonimmigrants "do not accrue unlawful presence in certain situations." [draft Adjudicator's Field Manual 40.9.2(b)(1)(E)(iii)]. <p>Thank you for your attention to and consideration of these issues.</p>	

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<p>Aja Pardini www.danielaharoni.com/ Attorney at Law Daniel Aharoni & Partners LLP [REDACTED] New York, NY [REDACTED] Telephone [REDACTED]</p>	<p>Sincerely, Dear USCIS:</p> <p>I write to voice my strong opposition to the new policy memorandum, "Accrual of Unlawful Presence and F, J, and M Nonimmigrants," posted by U.S. Citizenship and Immigration Services (USCIS) on May 11, 2018.</p> <p>I am an immigration attorney and given my experience, I have serious concerns regarding fundamental fairness and due process and firmly believe that if implemented this will have a significant negative impact on the student, vocational, and exchange visitor communities, without resolving or removing a present harm. The issue of whether an individual has violated their nonimmigrant status is complex and nuanced. Students and exchange visitors can accidentally and unknowingly violate their status by dropping slightly below a full course of study, or by engaging in innocent, but unauthorized activity. For example, F-1 students are permitted to engage in work at a "qualifying on-campus job" for up to 20 hours per week while school is in session. Therefore, an F-1 student who inadvertently exceeds the 20-hour limit by just a couple of hours has technically violated his or her student status. In addition, a Designated School Official may make a good faith error in advising a student by authorizing a reduced course load that should not have been approved, thereby leading the student to unknowingly and unintentionally violate their status. This unfairness is compounded when the status violation also serves as the "trigger" for the accrual of unlawful presence by dependents of students and exchange visitors.</p> <p>I personally represented a client who was granted a temporary health-related leave from her studies, traveled home to visit her parents, and was notified when she attempted to come back to her temporary home in New York to resume studies that the leave had not been entered into SEVIS. If this new policy is implemented she could have been barred from readmission and from completing her studies and supporting a US University through tuition based on the human error of the Designated School Official. Fortunately for her, the DSO was able to make the necessary corrections in SEVIS and she returned to graduate from the University and is now a renowned lighting designer who regularly hires US persons to assist her in her work for Broadway level theatre productions and major venues, including museums.</p> <p>USCIS states that the purpose of the new guidance is to "reduce the number of overstays" and "to improve how USCIS implements the unlawful presence ground of inadmissibility." Unfortunately, this approach accomplishes neither of these goals and will instead unfairly punish a potentially significant portion of the student and exchange visitor population, further erode foreign student enrollments at U.S. colleges and universities, and unnecessarily damage the U.S. economy. I urge USCIS to abandon this</p>	

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	<p>misguided directive and to maintain the unlawful presence guidance that has been in place for decades and ensures that fundamental fairness is a critical component in interpreting and implementing the unlawful presence statute.</p> <p>Sincerely,</p>	
<p>Alan Kaptanoglu [REDACTED]@[REDACTED]</p>	<p>To whom it may concern,</p> <p>I am writing to express my displeasure with the memo entitled "Accrual of Unlawful Presence and F, J, and M Nonimmigrants", open for public comment until the end of the day of June 11th.</p> <p>As far as I can tell, one can receive a student visa to study in the US that is either good for a certain predefined period of time, or that is valid as long as that person keeps a certain status, like being a full-time student at an accredited university. Under the current law, someone can be deported once they accrue 180 days of "unlawful status". If one's visa is for a specific period of time, the clock on one's accrual of "unlawful status" starts ticking once that period has expired, but if one's visa depends on maintaining some kind of status, that violation clock only starts ticking once USCIS becomes aware that one's status is no longer valid (which might happen if one requests a new immigration status or something like that). Once that happens, under current policy one still has effectively a 180-day grace period to renew or contest one's immigration status before one becomes deportable.</p> <p>This memo indicates a change in policy to start that clock as soon as one's status actually changes, not as soon as they discover that one's status has changed. This means that if, for example, an international student is miscategorized by a university administrator as not being enrolled for a few quarters (happens all the time!), that person could be immediately deported at any point in the future, since they would accrue 180 days of "unlawful status" in the eyes of USCIS, with very little recourse to contest that finding. If one gets deported they are then banned from entering the US again for 3-10 years.</p> <p>According to this article, https://www.insidehighered.com/news/2018/05/15/proposed-policy-presents-new-risks-international-students-accused-violating-terms, USCIS thinks 6% of people in the US on student visas are staying after their visas have expired. Even if that is correct (the methods used to determine this are unclear at best from the articles and other information I can find), this memo makes studying in the US a much riskier and stressful prospect for the 94% of international students who are following the plethora of other laws that they already have to follow to study here, some of whom will inevitably be deported and banned through no fault of their own.</p>	

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	<p>For that reason, I must very strongly suggest reconsidering this memo with regard to this section. Not only does this seem to be unlawful in several ways (no ability to defend oneself before deportation), but it also strikes me as unnecessary (6%, even if true, is a very small number) and counter-productive to the success of the nation (either throwing out highly educated international students who often contribute significantly to the economic and scientific progress of the US or reducing the number of international students studying in the US by making it a far more risky prospect).</p> <p>Best,</p>	
<p>Gaurav Shekhadiya [REDACTED]@[REDACTED]</p>	<p>Dear Director:</p> <p>I would like to submit the following comments in response to the USCIS Proposed Policy Memo "Accrual of Unlawful Presence and F, J, and M Nonimmigrants" (PM-602-1060), posted on May 11, 2018.</p> <p>I am an F-1 international student who has recently graduated from Texas A&M University- Kingsville and am working based on Optional Practical Training (OPT). My employer has recently petitioned for my H-1B work visa during the cap-subject application period in April.</p> <p>My concern with the proposed memorandum is that its new calculation of accrual of unlawful presence may jeopardize my ability to obtain a nonimmigrant visa from a consulate. By essentially equating unlawful presence with failure to maintain proper status, the policy memo puts an undue burden on F-1 students and penalizes them retroactively. The new calculation would render F-1 students unlawfully present dating back to the day after a failure to maintain F-1 status began, rather than from the day of an adverse decision by DHS or an immigration judge.</p> <p>This is an undue burden and disproportionate penalty on us F-1 students because the policies for maintaining proper F-1 status have not always been made uniformly clear to us, or even to our DSOs. As an F-1 student, I rely heavily on my school's DSO in order to maintain valid status, as he or she issues my I-20s, endorses the I-20s for work authorization, and updates my records in the SEVIS system. F-1 students may have engaged in certain employment activities with the full endorsement of their school's DSO, and issuance of an Employment Authorization Document by DHS, only to discover later that the initial grant of work authorization was improper.</p> <p>These inconsistencies are sometimes due to DSO error but are also due to DHS interpretations that may change without warning and get applied retroactively, to our detriment. Updates to USCIS interpretation of employer-employee relationships, for example, may retroactively invalidate an arrangement that I worked under during my OPT training period. The proposed policy memo would result in accrual of unlawful presence retroactively, during a period of time when USCIS policy was different or unclear.</p> <p>Furthermore, the extensive processing times for H-1B change of status petitions, combined with the</p>	

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	<p>suspension of premium processing for cap-subject H-1B applications, puts students like me at risk of having accrued unlawful presence for more than six months by the time USCIS has adjudicated my H-1B application and made a determination on whether I have maintained proper status. The extensive service center backlogs, suspension of premium processing, and sudden change in unlawful presence interpretation are all beyond the control of F-1 students. Under this memo, I may be determined to have unknowingly accrued several months of unlawful presence, and a possible 3- or 10-year bar against re-entry, without having possessed the intent to do so, and without any means to remedy my situation once I become aware of it.</p> <p>The accrual of unlawful presence calculation is currently linked to an adverse determination by DHS or an immigration judge (or by the expiration of an I-94) because such a determination actively puts the student on notice that he or she was no longer authorized to stay and/or work in the U.S., and should depart immediately. The calculation under this proposed memo will put students like me in a position to have possibly accrued several months of unlawful presence unknowingly. It is further exacerbated by the fact that their accrual of unlawful presence may have been endorsed by my school's DSO, the main immigration-related official that I have any contact with and on whom I rely. The application of the proposed memo will unfairly penalize students like me who have acted in good faith, who timely applied for work authorization, and acted according to the policies in effect at the time. It will affect our ability to apply for any other nonimmigrant visa in the U.S., as well as prevent us from applying for a visa at a consulate abroad due to the inadmissibility bar.</p> <p>It is not my intention to overstay my visa or to be unlawfully present in the U.S. I have come to study in the U.S. in order to gain a higher education in America's universities, and to supplement my education through hands-on work experience. My intention is to do so by complying with the relevant immigration regulations and policies. However, when those policies are not always clear, and my studies or work experience are being endorsed by the school's DSO, I feel I should not be penalized retroactively when I have acted in good faith and am informed later that there was a problem with my maintenance of status. I would advocate for the continuation of the current calculation of accrual of unlawful presence for F-1 individuals, which would allow for clear notice to the F-1 student concerning a failure to maintain proper status, a clear start date for the accrual of unlawful presence, and application of a re-entry bar only after remaining in the U.S. for a significant period beyond that notice. This calculation is equitable and avoids disproportionately penalizing students who have acted in good faith, and would allow us an opportunity to remedy our visa status once we become aware of the problem by being able to depart the U.S. as soon as we become aware that unlawful presence has begun to accrue.</p> <p>I urge against the implementation of this proposed policy memo. Thank you for your consideration, time, and support in this matter.</p>	

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Lynne Vanahill , PDSO http://www.iss.ku.edu/ Associate Director and SEVIS Coordinator International Student Services University of Kansas [REDACTED] Lawrence, KS ph: [REDACTED]	<p>Sincerely,</p> <p>I am a PDSO and ARO at a large, research university with over 2000 Active F-1 Students and 113 Active J-1 Students under our program sponsorship (although we currently have 202 J-1 students currently enrolled at our institution).</p> <p>Under Background (page 2, first two full paragraphs)</p> <p>The justification for this change in policy is unwarranted and based on inaccurate data. The policy cites “Fiscal Year 2016 Entry/Exit Overstay Report, Department of Homeland Security” (hereafter referred to as FY 2016 Overstay Report) as the justification to reduce the number of overstays and rewriting the policy defining when F, M and J students accrue unlawful presence. The FY 2016 Overstay Report states: “it was estimated that the overstay rate was 6.19 percent for F nonimmigrants, 3.80 percent for J nonimmigrants and 11.60 for M nonimmigrants.” It implies students overstay at a much higher rate than other categories as indicated in Table 1 in the report:</p> <p>Table 1 FY 2016 Summary Overstay rates for Nonimmigrant Visitors admitted to the United States via air and sea POEs</p> <table><tr><th>Admission Type</th><th>Expected Departures</th><th>Out-of-Country Overstays</th><th>Suspected In-Country Overstays</th></tr><tr><th>Overstays</th><th>Total Overstays</th><th>Total Overstay Rate</th><th>Suspected In-Country Overstay Rate</th></tr><tr><td>VWP Countries Business or Pleasure Visitors</td><td>20,21 (Table 2)</td><td>21,616,034</td><td>18,476 128,806</td></tr><tr><td>147,282</td><td>0.68%</td><td>0.60%</td><td></td></tr><tr><td>Non-VWP Countries Business or Pleasure Visitors (excluding Canada and Mexico) (Table 3)</td><td></td><td></td><td></td></tr><tr><td>13,848,480</td><td>23,637 263,470</td><td>287,107</td><td>2.07% 1.90%</td></tr><tr><td>Student and Exchange Visitors (excluding Canada and Mexico) (Table 4)</td><td></td><td></td><td>1,457,556</td></tr><tr><td>38,869 40,949 79,818</td><td>5.48%</td><td>2.81%</td><td></td></tr><tr><td>All Other In-Scope Nonimmigrant</td><td>22 Visitors (excluding Canada and Mexico) (Table 5)</td><td></td><td>1,427,188</td></tr><tr><td>13,504 29,498 43,002</td><td>3.01%</td><td>2.07%</td><td></td></tr><tr><td>Canada and Mexico Nonimmigrant Visitors (Table 6)</td><td></td><td>12,088,020</td><td>16,193 166,076</td></tr><tr><td>182,269</td><td>1.51%</td><td>1.37%</td><td></td></tr><tr><td>TOTAL</td><td>50,437,278</td><td>110,679</td><td>628,799 739,478 1.47% 1.25%</td></tr></table> <p>I have been in the field for over 27 years and I acknowledge that SEVIS has allowed for more accurate record-keeping of students. Additionally, there have been improvements to SEVIS since it became</p>	Admission Type	Expected Departures	Out-of-Country Overstays	Suspected In-Country Overstays	Overstays	Total Overstays	Total Overstay Rate	Suspected In-Country Overstay Rate	VWP Countries Business or Pleasure Visitors	20,21 (Table 2)	21,616,034	18,476 128,806	147,282	0.68%	0.60%		Non-VWP Countries Business or Pleasure Visitors (excluding Canada and Mexico) (Table 3)				13,848,480	23,637 263,470	287,107	2.07% 1.90%	Student and Exchange Visitors (excluding Canada and Mexico) (Table 4)			1,457,556	38,869 40,949 79,818	5.48%	2.81%		All Other In-Scope Nonimmigrant	22 Visitors (excluding Canada and Mexico) (Table 5)		1,427,188	13,504 29,498 43,002	3.01%	2.07%		Canada and Mexico Nonimmigrant Visitors (Table 6)		12,088,020	16,193 166,076	182,269	1.51%	1.37%		TOTAL	50,437,278	110,679	628,799 739,478 1.47% 1.25%	
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	<p>mandated in 2003 and interfaces with multiple agencies have improved. However, there are still grave problems with the current interfacing technology. The statistics above are significantly off and misleading. Please allow me to provide the following proof.</p> <p>From SEVIS I downloaded a report of "All Active Students" on May 21, 2018, which includes entry and exit data. We currently have 2070 Active F-1 Records. For all 2070, we have physically seen and checked in each student individually so I can verify they have arrived in the U.S. However, 321 do NOT have any "Date of Entry" recorded. That means the interface did not accurately record 15.5% of the entries. Additionally, 55.5% (1150/2070 records) do NOT show an I-94#. We have 425 records (20.53%) without a "Date of Departure". If entries are obviously off 15.5%, how can we give any credibility to the 5.48% of predicated "overstays"?</p> <p>Please refer to the Statement of Michael Dougherty, John Wagner, and Louis A. Rodi, III for a Hearing on "Examining the Problem of Visa Overstays: A Need for Better Track and Accountability" before the U.S. Senate Committee on the Judiciary Subcommittee on Border Security and Immigration, July 12th, 2017 (hereafter referred to as Hearing Statement). On page 5 of the Hearing Statement under "Reporting Overstay Data" in the 6th paragraph, updated statistics are given and it says "DHS has been able to confirm departures, changes to, extension of stay, or adjustment of status of 99.16 percent....and that number continues to grow."</p> <p style="text-align: center;">Suspected In-Country Overstays Suspected In-Country Overstay Rate</p> <p>May 2017 (table above) 628,7991.25%</p> <p>July 1, 2017 (updated as per Statement) 425,4950.84%</p> <p>Furthermore, under "Overstay Enforcement in the United States" on page 7 (2nd full paragraph on the page), the statement reads: "ICE HSI CTCEU reviewed 1,282,018 compliance leads." Nonetheless, out of the 1,282,018 leads, "numerous leads that were referred to ICE HSI CTCEU were closed through an automated vetting process." "A total of 4,116 leads were sent to HSI field offices for investigation." At the end of 2016, "1,884 were under investigation, 1,126 were closed as being in compliance" and the remaining 1,106 were returned to ICE HSI CTCEU for continuous monitoring and further investigation. "HSI Special Agents made 1,261 arrests, secured 97 indictments and 55 convictions in FY16".</p> <p>It is not clear where the 1,282,018 compliance leads come from but it is roughly double the number of suspected in-country overstays. If you apply the % of arrests, indictments and convictions made based</p>	

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	<p>on the number compliance leads to the number of suspected in-country overstay, the amount is negligible.</p> <p>Compliance Leads as per Hearing Statement 1,282,018 Percentage</p> <p>Arrests 1,261 0.09%</p> <p>Indictments 97 0.007%</p> <p>Convictions 55 0.004%</p> <p>Estimates based on % of actual arrests, indictments and convictions of compliance leads (Hearing Statement) Total Suspected In-Country Overstays (FY 16 Overstay Report) Student and Exchange Visitor (excluding Canada and Mexico) Suspected In-Country Overstays (FY 16 Overstay Report)</p> <p>628,79940,949</p> <p># of potential arrests (0.09%) 566 37</p> <p># of potential indictments (0.007%) 44 3</p> <p># of potential convictions (0.004%) 25 2</p> <p>When you look at the inaccuracy of SEVIS and other databases to accurately capture departures and changes of status along with the net effect of how many potential convictions of student overstay are likely, this drastic change seems unwarranted.</p> <p>To further my point on the inaccuracy of overstay data of students, the Hearing Statement talks about "Existing DHS Entry and Exit Data Collection" on page 2. It explains how a biographic-based entry/exit system matches data on the individual's passport presented upon arrival and departure. I'd like to point out students often need to get new passports while in the U.S. A bachelor's degree on average takes 4.5 years and a PhD can easily take 5-7 years. It is quite common for students to get new passports with new passport numbers increasing the likelihood of data mismatches and false overstay statistics. Furthermore, the FY 16 Overstay Report emphasizes the reliance on passport info. See page 2 under II. Background (5th paragraph) where the report states "Federal law requires the carriers to provide specific sets of data, which include name and passport number". "CBP then matches these biographic (emphasis added) departure data against arrival data to determine who has complied with the terms of admission and who has overstayed." Also in paragraph 6, the FY 16 Overstay Report says "The United States did not build its border, aviation, and immigration infrastructure with exit processing in mind." "Instead, traveler departures are recorded biographically using outbound passenger manifests provided by commercial carriers." I would assume the outbound passenger manifest only includes the current (new) passport number and does not necessarily easily match up to</p>	

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	<p>an inbound passenger manifest which used the old passport number. Sometimes, there are even slight variations in names in new passports which further complicate matches to accurately record departures.</p> <p>Implementation (page 7)</p> <p>(first full paragraph) “Over the years, DHS has also made significant progress in its ability to identify and calculate the number of nonimmigrants who have failed to maintain status, including certain F, J, or M nonimmigrants”</p> <p>Yes, significant progress has been made, but that doesn’t mean the data accurately reflects who has maintained status and who has overstayed.</p> <p>(second paragraph) “For example, since the creation of the policy, the Student and Exchange Visitor Information System (SEVIS)—the DHS system used to monitor F, J, and M nonimmigrants—has provided USCIS officers additional information about an alien’s immigration history, including information that indicates that an alien in F, J, or M nonimmigrant status may (emphasis added) have completed or ceased to pursue his or her course of study or activity”</p> <p>“may” is a key operative word.</p> <p>“For FY 2016, DHS calculated that a total of 1,457,556 aliens admitted in F, J, and M nonimmigrant status were either expected to change status or depart the United States. Of this population, it was estimated that the total overstay rate was 6.19 percent for F nonimmigrants, 3.80 percent for J nonimmigrants, and 11.60 percent for M nonimmigrants.”</p> <p>These are just estimates and as my statistics have shown they are grossly in error. Additionally, we don’t have a high percentage of students applying for a change of status but for the ones who do, an overwhelming majority do NOT have the change of status application appropriately attach to their SEVIS record.</p> <p>Under Policy (page 4) and Implementation (page 7)</p> <p>I have grave concerns that “failure to maintain nonimmigrant status” seems to be equated with a “Terminated” status in SEVIS. The Department of State has always said that SEVIS represents one’s program status and not one’s legal nonimmigrant status. They have a video on SEVIS Status Corrections (https://j1visa.state.gov/sevis-status-corrections/) confirming the status in SEVIS is just a SEVIS status – not a nonimmigrant legal status. It should not be the responsibility of P/DSOs and A/ROs to determine a student’s legal status. That should ONLY be determined by a Federal</p>	

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	<p>government employee such as USCIS or an immigration judge as the former policy stated. The policy says "When assessing whether an F, J, or M nonimmigrant accrued unlawful presence and was no longer in a period of stay authorized, the USCIS officer should consider information relating to the alien's immigration history, including but not limited to: Information contained in the systems available to USCIS" I assume the systems available to USCIS includes SEVIS.</p> <p>Also the policy says unlawful presence begins to accrue when a student "no longer pursues the course of study". This is very broad and could unfairly be detrimental to a student's objective of obtaining a degree. For example, this Spring 2018, I had to terminate a SEVIS record for an undergraduate student who was enrolled in 9 hours instead of the required 12 hour minimum. He is a senior and had been continuously enrolled full time every fall and spring since his arrival Spring 2014. Additionally, he had enrolled 2 summers even though summer enrollment is optional. In this situation, the student had tried to add another class to be full time on the last day to add classes; however, he was unable to add the class because of a \$25 unpaid parking ticket. It would be inappropriate to classify this student as an "overstay". The consequences of a potential 3 and 10-year bar seems excessive in this situation.</p> <p>To further reiterate, the 3 and 10 year bar for any violation of status seems unjust and punitive. Not all violations are equal. I have another example of a student who had been continuously enrolled full time for 5 semesters plus 2 optional summers. He was enrolled in 15 hours one semester, but was doing poorly in a 4-hour class and dropped the class leaving him with 11 hours. Since he dropped below full time without permission I terminated his SEVIS record. Again, this is not an appropriate classification of an "overstay."</p> <p>I have yet another example this spring 2018. I had a student who was enrolled full time the entire semester. On the very last day of classes, he requested his department to retroactively withdraw from 2 classes due to poor performance. One could argue he pursued a full course of study the entire semester; however, I was obligated to terminate his I-20 since he withdrew without permission. Again, this student should not be classified as an "overstay."</p> <p>Similarly, we have students who fail to extend their I-20s in a timely fashion. This is just an administrative oversight. They continue to be enrolled full time. It seems cruel to classify these full time students as "overstays."</p> <p>In the FY 16 Overstay Report on page 8 under "C. Overstay Definition" (first paragraph) it says "'Duration of status" is a term used for foreign nationals who are admitted for the duration of a specific</p>	




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	<p>program or activity” “The lawful admission period ends when the foreign national has accomplished the purpose or is no longer engaged in authorized activities pertaining to that purpose.” For a student who continues to pursue a full course of study, even though their I-20 may have expired is difficult to argue they are no longer engaged in authorized activities. Likewise, for a student who has continually pursued a full course of study over a period of time and drops below full time one semester without permission is not in my eyes an “overstay.”</p> <p>Page 10 Examples when F students Do NOT accrue unlawful presence</p> <p>The last bullet point says unlawful presence does not accrue during “The period of time an F-1 nonimmigrant was out of status if he or she applies for reinstatement under 8 CFR 214.2(f)(16), provided that the application is ultimately approved”</p> <p>This does not address how unlawful presence is calculated if the reinstatement application is denied. Reinstatement times vary greatly. Right now they seem to be taking between 4 and 9 months on average. What would happens if USCIS takes 7 months to process the reinstatement and denies the application. Is the student automatically barred from the U.S. for 3 years? Will the processing times of USCIS impact unfairly impact one’s inadmissibility?</p> <p>Lastly, if we had been given more than 30 days to make comments, my comments would have been more succinct and better organized. I just returned from two weeks away from the office and combined with a busy time of the year, I was not able to devote as much attention to this as I think it deserves.</p>	
<p>Valav Oza [REDACTED]@[REDACTED]</p>	<p>Dear Director:</p> <p>I would like to submit the following comments in response to the USCIS Proposed Policy Memo “Accrual of Unlawful Presence and F, J, and M Nonimmigrants” (PM-602-1060), posted on May 11, 2018.</p> <p>I am an F-1 international student who has recently graduated from Texas A&M University-Kingsville and am working based on Optional Practical Training (OPT). My employer has recently petitioned for my H-1B work visa during the cap-subject application period in April.</p> <p>My concern with the proposed memorandum is that its new calculation of accrual of unlawful presence may jeopardize my ability to obtain a nonimmigrant visa from a consulate. By essentially equating unlawful presence with failure to maintain proper status, the policy memo puts an undue burden on F-1 students and penalizes them retroactively. The new calculation would render F-1 students unlawfully</p>	

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	<p>present dating back to the day after a failure to maintain F-1 status began, rather than from the day of an adverse decision by DHS or an immigration judge.</p> <p>This is an undue burden and disproportionate penalty on us F-1 students because the policies for maintaining proper F-1 status have not always been made uniformly clear to us, or even to our DSOs. As an F-1 student, I rely heavily on my school's DSO in order to maintain valid status, as he or she issues my I-20s, endorses the I-20s for work authorization, and updates my records in the SEVIS system. F-1 students may have engaged in certain employment activities with the full endorsement of their school's DSO, and issuance of an Employment Authorization Document by DHS, only to discover later that the initial grant of work authorization was improper.</p> <p>These inconsistencies are sometimes due to DSO error but are also due to DHS interpretations that may change without warning and get applied retroactively, to our detriment. Updates to USCIS interpretation of employer-employee relationships, for example, may retroactively invalidate an arrangement that I worked under during my OPT training period. The proposed policy memo would result in accrual of unlawful presence retroactively, during a period of time when USCIS policy was different or unclear.</p> <p>Furthermore, the extensive processing times for H-1B change of status petitions, combined with the suspension of premium processing for cap-subject H-1B applications, puts students like me at risk of having accrued unlawful presence for more than six months by the time USCIS has adjudicated my H-1B application and made a determination on whether I have maintained proper status. The extensive service center backlogs, suspension of premium processing, and sudden change in unlawful presence interpretation are all beyond the control of F-1 students. Under this memo, I may be determined to have unknowingly accrued several months of unlawful presence, and a possible 3- or 10-year bar against re-entry, without having possessed the intent to do so, and without any means to remedy my situation once I become aware of it.</p> <p>The accrual of unlawful presence calculation is currently linked to an adverse determination by DHS or an immigration judge (or by the expiration of an I-94) because such a determination actively puts the student on notice that he or she was no longer authorized to stay and/or work in the U.S., and should depart immediately. The calculation under this proposed memo will put students like me in a position to have possibly accrued several months of unlawful presence unknowingly. It is further exacerbated by the fact that their accrual of unlawful presence may have been endorsed by my school's DSO, the main immigration-related official that I have any contact with and on whom I rely. The application of the</p>	

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	<p>proposed memo will unfairly penalize students like me who have acted in good faith, who timely applied for work authorization, and acted according to the policies in effect at the time. It will affect our ability to apply for any other nonimmigrant visa in the U.S., as well as prevent us from applying for a visa at a consulate abroad due to the inadmissibility bar.</p> <p>It is not my intention to overstay my visa or to be unlawfully present in the U.S. I have come to study in the U.S. in order to gain a higher education in America's universities, and to supplement my education through hands-on work experience. My intention is to do so by complying with the relevant immigration regulations and policies. However, when those policies are not always clear, and my studies or work experience are being endorsed by the school's DSO, I feel I should not be penalized retroactively when I have acted in good faith and am informed later that there was a problem with my maintenance of status. I would advocate for the continuation of the current calculation of accrual of unlawful presence for F-1 individuals, which would allow for clear notice to the F-1 student concerning a failure to maintain proper status, a clear start date for the accrual of unlawful presence, and application of a re-entry bar only after remaining in the U.S. for a significant period beyond that notice. This calculation is equitable and avoids disproportionately penalizing students who have acted in good faith, and would allow us an opportunity to remedy our visa status once we become aware of the problem by being able to depart the U.S. as soon as we become aware that unlawful presence has begun to accrue.</p> <p>I urge against the implementation of this proposed policy memo. Thank you for your consideration, time, and support in this matter.</p> <p>Sincerely,</p>	
<p>Viswanath Nemani [REDACTED]@[REDACTED]</p>	<p>Dear Director:</p> <p>I would like to submit the following comments in response to the USCIS Proposed Policy Memo "Accrual of Unlawful Presence and F, J, and M Nonimmigrants" (PM-602-1060), posted on May 11, 2018.</p> <p>I am an F-1 international student who has recently graduated from University of Missouri-Kansas city and am working based on Optional Practical Training (OPT). My employer has recently petitioned for my H-1B work visa during the cap-subject application period in April.</p> <p>My concern with the proposed memorandum is that its new calculation of accrual of unlawful presence may jeopardize my ability to obtain a nonimmigrant visa from a consulate. By essentially equating unlawful presence with failure to maintain proper status, the policy memo puts an undue burden on F-1 students and penalizes them retroactively. The new calculation would render F-1 students unlawfully</p>	

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<p>Ravi Shankar [REDACTED]@[REDACTED]</p>	<p>Dear Director:</p> <p>The following are my comments in response to the USCIS Proposed Policy Memo "Accrual of Unlawful Presence and F, J, and M Nonimmigrants" (PM-602-1060), posted on May 11, 2018. The policy memo puts an undue burden on F-1 students and penalizes them retroactively. The new calculation would render F-1 students unlawfully present dating back to the day after their failure to maintain F-1 status began, rather than from the day of an adverse decision by DHS or an immigration judge.</p> <p>This is an undue burden and disproportionate penalty on the F-1 students, and on our company as their employer, because the policies for maintaining proper F-1 status have not always been made uniformly clear to the students, their employers, and even to the DSOs. Why should the student be deemed illegal because of this ambiguity. F-1 students relying on DSO's for their best judgement. The proposed policy memo would result in the student accruing unlawful presence retroactively, during a period of time when USCIS policy was different or unclear. Under this memo, students may be determined to have unknowingly accrued several months of unlawful presence, and a possible 3- or 10-year bar against re-entry, without having possessed the intent to do so, and without any means to remedy their situation once they become aware of it.</p> <p>The accrual of unlawful presence calculation is currently linked to an adverse determination by DHS or an immigration judge (or by the expiration of an I-94) because such a determination actively puts the</p>	

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	<p>student on notice that he or she was no longer authorized to stay and/or work in the U.S., and should depart immediately. The calculation under this proposed memo will put students in a position to have possibly accrued several months of unlawful presence unknowingly. It is further exacerbated by the fact that their accrual of unlawful presence may have been endorsed by their school's DSO, the main immigration-related official that most of the students have any contact with and on whom they rely. The application of the proposed memo will unfairly penalize students who have acted in good faith, who timely applied for work authorization that was made available to them, and acted according to the policies in effect at the time. It will affect their ability to apply for any other nonimmigrant visa in the U.S., as well as prevent them from applying for a visa at a consulate abroad due to the inadmissibility bar.</p> <p>We would advocate for the continuation of the current calculation of accrual of unlawful presence for F-1 individuals, which would allow for clear notice to the F-1 student concerning a failure to maintain proper status, a clear start date for the accrual of unlawful presence, and only penalizes them with a re-entry bar if they knowingly remain in the U.S. for a significant period beyond that notice. This calculation is equitable and avoids disproportionately penalizing students and their employers who have acted in good faith, and allows the students an opportunity to remedy their visa status once they become aware of the problem.</p> <p>We urge against the implementation of this proposed policy memo. Thank you for your consideration, time, and support in this matter.</p> <p>Sincerely</p>	
<p>Ann L. Gemmell, M.A., J.D.  Assistant Director of Admissions, PDSO p.  f. </p>	<p>Dear Director Cissna:</p> <p>I am writing in response to the U.S. Citizenship and Immigration Services (USCIS) Policy memorandum of May 10, 2018, "Accrual of Unlawful Presence and F, J, and M Nonimmigrants." This memo signifies a radical departure from long held prior guidance on unlawful presence which held that unlawful presence does not accrue until after a formal finding by USCIS or immigration judge that the student violated their status. Most importantly, this new guidance could lead to very significant and life-altering consequences for minor status offenses of which a student and their family may not even be aware. Because of this, I request that you withdraw the memo and leave in place the current policy.</p> <p>I am very concerned that students who rely in large part on their school for immigration guidance (and not an immigration attorney) will not understand the significance of a relatively minor status violation on their future as a student and beyond. I have witnessed over the course of my fifteen-year career in international education, many higher education institution and professionals that do not have the understanding or experience to properly and thoroughly advise their international students. In these</p>	

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	<p>cases, the students bear the consequences. Schools will not change their practices based on this memo, and so students will shoulder the disproportionate punishment of a three-year, ten-year, or permanent bar to admissibility in many cases simply for relying on incorrect or incomplete advice. A student may not even know they are out of status. This is clearly unfair, and thus is counter to the USCIS mission to "fairly adjudicat[e] requests for immigration benefits."</p> <p>Not only is this new policy unduly severe, it also creates a complex and thus unclear guideline, by moving away from the policy that has been in place for 20 years, which counts days of unlawful presence after a formal finding of status violation. Moreover, it makes the remedy of reinstatement less viable because a student would have to risk accruing unlawful presence to apply. If the agency takes many months to adjudicate the application (which is not unrealistic) and then denies the applicant, the student could very likely be subject to the three-year bar to admissibility.</p> <p>International students in the United States invest tens or even hundreds of thousands of dollars and years of their lives at U.S. institutions and it is unjust and inequitable to treat such minor mistakes as forgetting to get CPT approval for an off-campus course, or not allowing enough time to work on a school transfer due to a mistaken understanding about the application process, in such a draconian way. This policy will surely alienate many promising international students from studying in the United States or becoming cultural ambassadors for the United States when they return to their home country, thus making the United States less safe. Therefore, this guidance defeats the USCIS mission of "protecting Americans [and] securing the homeland."</p> <p>Thank you for the opportunity to comment.</p>	
<p>Claudia Black [REDACTED]@[REDACTED]</p>	<p>Dear Director,</p> <p>I would like to submit the following comments in response to the USCIS Proposed Policy Memo "Accrual of Unlawful Presence and F, J, and M Nonimmigrants" (PM-602-1060), posted on May 11, 2018.</p> <p>On the assumption that this Policy Memo will become a Final Rule in more or less its current form, I urge you to revise and clarify the language about if and when unlawful presence ("ULP") begins to accrue for certain individuals.</p> <p>The statement: "F, J, or M nonimmigrants who failed to maintain their nonimmigrant status before August 9, 2018 start accruing unlawful presence based on that failure on August 9, 2018 unless..."</p>	

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	<p>seems to make it clear that an individual engaged, for example, in unauthorized employment will begin to accrue ULP on 8/9/18.</p> <p>However, the next paragraph states:</p> <p>"An F, J, or M nonimmigrant begins accruing unlawful presence, due to a failure to maintain his or her status on or after August 9, 2018, on the earliest of any of the following..."</p> <p>This sentence could be rephrased as:</p> <p>"Due to a failure to maintain status on or after 8/9/18, an F, J, or M nonimmigrant begins accruing ULP on the earliest of any of the following..."</p> <p>This seems to suggest that ULP would be applied retroactively, so that an individual who had no ULP on 8/8/2018 may have a 10-year bar on 8/9/2018.</p> <p>It also appears to be in direct contradiction to the previous paragraph, unless you are trying to say that a person engaged (for example) in unauthorized employment on a J-1 visa has not in fact failed to maintain his or her status until 8/9/18. Given this is a rather unorthodox interpretation, you should explicitly so-state if it is in fact your intention.</p> <p>As the rule is currently written, it is unclear if or when ULP would begin to accrue in the following situations:</p> <ol style="list-style-type: none"> 1) An individual who has been and continues to violate their status (for example, via unauthorized employment) as of 8/9/18. Does ULP begin to accrue as of 8/9/18, or as of the date of employment? 2) An individual who previously violated their status (for example, via unauthorized employment), but who no longer violates his or her status. Are such people now deemed to be out of status, and thus accrues ULP as of 8/9/18? Or are they considered to be in status because they are no longer violating their status and no formal finding of violating status was made? 3) If an individual previously violated their status (for example, via unauthorized employment), AND that person has subsequently departed and re-entered the US on their valid F, J, or M visa, will that person still begin to accrue ULP as of 8/9/18 on the basis of their previous violation? 	

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	<p>I urge you to clarify these important points as they will have a significant impact on certain people, and because the rule is seemingly contradictory the way it is currently written.</p> <p>Furthermore, I urge you to not adopt this rule. This policy memo equates being out of status and being unlawfully present, even though the two terms do not have the same meaning, and is not applied to any other nonimmigrant visa classifications at this time.</p> <p>The retroactive application of unlawful presence is particularly problematic.</p> <p>Consider, for example, an F-1 student who received CPT in his first year of study, who also has an H-1B change of status application filed for him and selected in the lottery in April. This individual could find out on August 30 in his H-1B decision that his first-year CPT is considered invalid because USCIS was not persuaded that it was an essential component of the degree program.</p> <p>Under the current framework, the student may be considered to have been out of status during the entire CPT period, dating back to September of the previous year, but unlawful presence only begins to accrue on August 30, the day he receives the USCIS decision informing him of the same. He is now on notice to depart as soon as possible (and apply for the H-1B visa stamp at a consulate), or risk a 3-year re-entry bar if he remains in the U.S. beyond the end of February.</p> <p>Under the proposed policy memo's framework, the student could be considered to be both out of status and unlawfully present from the second day of his CPT employment – which by that point, maybe a year ago. He would find out, on August 30, that he has already accrued almost one year of unlawful presence.</p> <p>Such a policy penalizes not only the student, but also the US employer who has invested significant time and money into an individual who now has inadvertently earned a bar to re-entry and is unemployable.</p> <p>While presumably designed to penalize those who knowingly abuse their visas, there are clearly many others who will also be unfairly and harshly penalized.</p> <p>Thank you for your consideration.</p>	

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Cynthia Hu [REDACTED]@[REDACTED]	<p>Sincerely,</p> <p>Dear Director:</p> <p>I would like to submit the following comments in response to the USCIS Proposed Policy Memo "Accrual of Unlawful Presence and F, J, and M Nonimmigrants" (PM-602-1060), posted on May 11, 2018.</p> <p>I am an F-1 international student who has graduated from Fordham University and am working based on Optional Practical Training Stem (OPT Stem). My employer has recently petitioned for my H-1B work visa during the cap-subject application period in April.</p> <p>My concern with the proposed memorandum is that its new calculation of accrual of unlawful presence may jeopardize my ability to obtain a nonimmigrant visa from a consulate. By essentially equating unlawful presence with failure to maintain proper status, the policy memo puts an undue burden on F-1 students and penalizes them retroactively. The new calculation would render F-1 students unlawfully present dating back to the day after a failure to maintain F-1 status began, rather than from the day of an adverse decision by DHS or an immigration judge.</p> <p>This is an undue burden and disproportionate penalty on us F-1 students because the policies for maintaining proper F-1 status have not always been made uniformly clear to us, or even to our DSOs. As an F-1 student, I rely heavily on my school's DSO in order to maintain valid status, as he or she issues my I-20s, endorses the I-20s for work authorization, and updates my records in the SEVIS system. F-1 students may have engaged in certain employment activities with the full endorsement of their school's DSO, and issuance of an Employment Authorization Document by DHS, only to discover later that the initial grant of work authorization was improper.</p> <p>These inconsistencies are sometimes due to DSO error but are also due to DHS interpretations that may change without warning and get applied retroactively, to our detriment. Updates to USCIS interpretation of employer-employee relationships, for example, may retroactively invalidate an arrangement that I worked under during my OPT Stem training period. The proposed policy memo would result in accrual of unlawful presence retroactively, during a period of time when USCIS policy was different or unclear.</p> <p>Furthermore, the extensive processing times for H-1B change of status petitions, combined with the suspension of premium processing for cap-subject H-1B applications, puts students like me at risk of having accrued unlawful presence for more than six months by the time USCIS has adjudicated my H-1B application and made a determination on whether I have maintained proper status. The extensive service center backlogs, suspension of premium processing, and sudden change in unlawful presence interpretation are all beyond the control of F-1 students. Under this memo, I may be determined to have unknowingly accrued several months of unlawful presence, and a possible 3- or 10-year bar against re-entry, without having possessed the intent to do so, and without any means to remedy my situation once</p>	

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	<p>I become aware of it.</p> <p>The accrual of unlawful presence calculation is currently linked to an adverse determination by DHS or an immigration judge (or by the expiration of an I-94) because such a determination actively puts the student on notice that he or she was no longer authorized to stay and/or work in the U.S., and should depart immediately. The calculation under this proposed memo will put students like me in a position to have possibly accrued several months of unlawful presence unknowingly. It is further exacerbated by the fact that their accrual of unlawful presence may have been endorsed by my school's DSO, the main immigration-related official that I have any contact with and on whom I rely. The application of the proposed memo will unfairly penalize students like me who have acted in good faith, who timely applied for work authorization, and acted according to the policies in effect at the time. It will affect our ability to apply for any other nonimmigrant visa in the U.S., as well as prevent us from applying for a visa at a consulate abroad due to the inadmissibility bar.</p> <p>It is not my intention to overstay my visa or to be unlawfully present in the U.S. I have come to study in the U.S. in order to gain a higher education in America's universities, and to supplement my education through hands-on work experience. My intention is to do so by complying with the relevant immigration regulations and policies. However, when those policies are not always clear, and my studies or work experience are being endorsed by the school's DSO, I feel I should not be penalized retroactively when I have acted in good faith and am informed later that there was a problem with my maintenance of status. I would advocate for the continuation of the current calculation of accrual of unlawful presence for F-1 individuals, which would allow for clear notice to the F-1 student concerning a failure to maintain proper status, a clear start date for the accrual of unlawful presence, and application of a re-entry bar only after remaining in the U.S. for a significant period beyond that notice. This calculation is equitable and avoids disproportionately penalizing students who have acted in good faith, and would allow us an opportunity to remedy our visa status once we become aware of the problem by being able to depart the U.S. as soon as we become aware that unlawful presence has begun to accrue.</p> <p>I urge against the implementation of this proposed policy memo. Thank you for your consideration, time, and support in this matter.</p> <p>Sincerely,</p>	
<p>Sunitha Naidu [REDACTED]@[REDACTED]</p>	<p>Dear Director:</p> <p>I would like to submit the following comments in response to the USCIS Proposed Policy Memo "Accrual of Unlawful Presence and F, J, and M Nonimmigrants" (PM-602-1060), posted on May 11, 2018.</p> <p>I am an F-1 international student. My employer has recently petitioned for my H-1B work visa. My concern with the proposed memorandum is that its new calculation of accrual of unlawful presence may</p>	

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	<p>jeopardize my ability to obtain a nonimmigrant visa from a consulate. By essentially equating unlawful presence with failure to maintain proper status, the policy memo puts an undue burden on F-1 students and penalizes them retroactively. The new calculation would render F-1 students unlawfully present dating back to the day after a failure to maintain F-1 status began, rather than from the day of an adverse decision by DHS or an immigration judge.</p> <p>This is an undue burden and disproportionate penalty on us F-1 students because the policies for maintaining proper F-1 status have not always been made uniformly clear to us, or even to our DSOs. As an F-1 student, I rely heavily on my school's DSO in order to maintain valid status, as he or she issues my I-20s, endorses the I-20s for work authorization, and updates my records in the SEVIS system. F-1 students may have engaged in certain employment activities with the full endorsement of their school's DSO, and issuance of an Employment Authorization Document by DHS, only to discover later that the initial grant of work authorization was improper.</p> <p>It is not my intention to overstay my visa or to be unlawfully present in the U.S. I have come to study in the U.S. in order to gain a higher education in America's universities, and to supplement my education through hands-on work experience. My intention is to do so by complying with the relevant immigration regulations and policies. However, when those policies are not always clear, and my studies or work experience are being endorsed by the school's DSO, I feel I should not be penalized retroactively when I have acted in good faith and am informed later that there was a problem with my maintenance of status. I would advocate for the continuation of the current calculation of accrual of unlawful presence for F-1 individuals, which would allow for clear notice to the F-1 student concerning a failure to maintain proper status, a clear start date for the accrual of unlawful presence, and application of a re-entry bar only after remaining in the U.S. for a significant period beyond that notice. This calculation is equitable and avoids disproportionately penalizing students who have acted in good faith, and would allow us an opportunity to remedy our visa status once we become aware of the problem by being able to depart the U.S. as soon as we become aware that unlawful presence has begun to accrue.</p> <p>I urge against the implementation of this proposed policy memo. Thank you for your consideration, time, and support in this matter.</p> <p>Thank you.</p>	
<p>Sreekanth Reddy [REDACTED]@[REDACTED]</p>	<p>Hello Director,</p> <p>I would suggest not to remove the current policy because students who wish to pursue knowledge and also gain practical experience as part of the study this a good way to progress carrier.</p> <p>I urge against the implementation of this proposed policy memo. Thank you for your consideration, time, and support in this matter.</p>	

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	Regards	
<p>Nancy E. Young [REDACTED]@[REDACTED]</p>	<p>Dear Director Cissna,</p> <p>I am writing to express my opposition to and concerns about the unlawful presence changes that have been proposed for F, J, and M nonimmigrants, based on the USCIS policy memo of 5/10/18 titled "Accrual of Unlawful Presence and F, J, and M Nonimmigrants." I appreciate the opportunity to provide feedback and your consideration of it. The U.S. can and has upheld both international education and national security as values simultaneously. In fact, robust international education contributes to national security.</p> <p>As a long-time international student advisor with experience as a Designated School Official (working with F-1 students) and Alternate Responsible Officer (working with J-1 programs) my response to this proposed policy is the old adage "If it ain't broke, don't fix it." This policy promises to complexify the work of USCIS, burden its limited resources, make international student and scholar advising needlessly more difficult, increase concerns and confusion among F, J, and M nonimmigrants as to the consequences of actions, and further erode the enviable standing the U.S. holds worldwide as THE international education destination. International students and scholars come to the U.S. to learn, research, and teach, let's help them do that.</p> <p>Briefly stated, the new memorandum will reverse more than 20 years of USCIS practice regarding the accrual of "unlawful presence," a legal term defined under section 212(a)(9)(B)(ii) of the Immigration and Nationality Act (INA) by reference to an individual who "is present in the United States after expiration of the period of stay authorized by the Attorney General or is present in the United States without being admitted or paroled." For nonimmigrant students and exchange visitors in the F, J, and M categories, legacy Immigration and Naturalization Service (INS) and USCIS have interpreted the statutory unlawful presence provisions to require notice to the individual of a status violation prior to the commencement of the unlawful presence clock. Such notice is provided in the context of the adjudication of a request for an immigration benefit by USCIS or a determination of a status violation by an immigration judge. The USCIS guidance articulating this position states, "It must be emphasized that the accrual of unlawful presence neither begins on the date that a status violation occurs, nor on the day on which removal proceedings are initiated." [1] This longstanding policy provides certainty in determining when unlawful presence begins to accrue, which the new policy does not.</p> <p>The current policy of 20+ years makes a distinction between violating immigration status and being unlawfully present in the U.S. The immigration regulations are, by nature, quite complex. There are times when a student may unknowingly violate immigration regulations, for example, an F-1 student may take more online credits than is allowed by the regulations. Students need to have the ability to</p>	



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	<p>apply for reinstatement of status to USCIS and know that even if it is denied, the unlawful presence would start at the date of denial under current policy, giving the student time to make arrangements to leave the country or ask USCIS for reconsideration. In the proposed policy, it's anticipated that most students with denied reinstatement applications would be subject to at least the 3-year bar, because of USCIS processing times. As described in the May 11, 2018 memorandum, USCIS will now deem unlawful presence to have started accruing as of the day after the date that a status violation occurs, thus removing the critical procedural safeguard of providing notice to affected individuals that may find themselves subject to the three- and ten-year bars to admissibility. This raises serious questions regarding fundamental fairness and due process and will have a significant negative impact on the student, vocational, and exchange visitor communities. Long USCIS adjudication times, for example, may lead to someone becoming subject to the unlawful presence penalties in any case that is ultimately denied reinstatement, for example, a student who falls below full-time enrollment for one term and then applies for reinstatement the following term when they are registered as a full-time student. In proposing such a policy, it is imperative that USCIS considers the big picture impact. International students and scholars add value to the U.S. They add value in terms of the academic contributions they make to U.S. higher education institutions as students, graduate teaching assistants, researchers, and faculty. They add value in terms of the economic contributions they make to the higher education institutions and local communities where they live. And the most important – and hardest to measure they add value with the cultural exchange and interaction at the individual, institutional, local levels and beyond. In a fundamental way, international education and its participants make the U.S. safer by the positive interactions they have with U.S. culture and sharing that experience with family, friends, and future colleagues in their home countries. In upholding national security, it is important that the U.S. model policies that are fair and not unduly complex.</p> <p>To that end, I urge you to leave the current policy in place, which has served for over 20 years. Thank you for the opportunity to comment.</p> <p>Sincerely,</p>	
Iramofu Dominic [REDACTED]@[REDACTED]	<p>"... foreign students and exchange visitors (F and J nonimmigrants, respectively) who were admitted for, or present in the United States in, duration of status (D/S) started accruing unlawful presence on the day after USCIS formally found a nonimmigrant status violation while adjudicating a request for another immigration benefit or on the day after an immigration judge ordered the applicant excluded, deported, or removed (whether or not the decision is appealed), whichever came first. F and J nonimmigrants, and foreign vocational students (M nonimmigrants), who were admitted until a specific date (date certain) accrued unlawful presence on the day after their Form I-94 expired, on the day after USCIS formally found a nonimmigrant status violation while adjudicating a request for another immigration benefit, or on the day after</p>	

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	<p>an immigration judge ordered the applicant excluded, deported, or removed (whether or not the decision was appealed), whichever came first. ... Under the former [that is, current but soon to be superseded] policy, an alien admitted for duration of status who overstayed or violated such status did not immediately begin accruing a period of unlawful presence ... "</p> <p>The current INS policy distinguishes between immigration status violation and unlawful presence in the United States in such a way that gives impacted international students sufficient time to take any necessary action to remedy the situation. The new policy however, removes this distinction, and puts students at the risk of being unlawfully present even while their immigration status is being adjudicated upon, and therefore potentially subject to 3- or 10-year reentry bar penalties.</p> <p>The US has been at the top of global higher education and research for many decades due to its ability to attract and retain the best brains from around the world. Such a policy will deter such individuals from considering the US as a destination for their higher education aspirations. For these reasons, it is my request that the old policy remain in effect with none of the new amendments added.</p> <p>Thank you.</p> <p>Best regards,</p>	
<p>Manish Singh [REDACTED]@[REDACTED]</p>	<p>Dear Director:</p> <p>I would like to submit the following comments in response to the USCIS Proposed Policy Memo "Accrual of Unlawful Presence and F, J, and M Nonimmigrants" (PM-602-1060), posted on May 11, 2018.</p> <p>I am an F-1 international student who has recently graduated from University of Florida and am working based on Optional Practical Training (OPT). My employer has recently petitioned for my H-1B work visa during the cap-subject application period in April.</p> <p>My concern with the proposed memorandum is that its new calculation of accrual of unlawful presence may jeopardize my ability to obtain a nonimmigrant visa from a consulate. By essentially equating unlawful presence with failure to maintain proper status, the policy memo puts an undue burden on F-1 students and penalizes them retroactively. The new calculation would render F-1 students unlawfully present dating back to the day after a failure to maintain F-1 status began, rather than from the day of an adverse decision by DHS or an immigration judge.</p> <p>This is an undue burden and disproportionate penalty on us F-1 students because the policies for maintaining proper F-1 status have not always been made uniformly clear to us, or even to our DSOs. As an F-1 student, I rely heavily on my school's DSO in order to maintain valid status, as he or she</p>	

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	<p>issues my I-20s, endorses the I-20s for work authorization, and updates my records in the SEVIS system. F-1 students may have engaged in certain employment activities with the full endorsement of their school's DSO, and issuance of an Employment Authorization Document by DHS, only to discover later that the initial grant of work authorization was improper.</p> <p>These inconsistencies are sometimes due to DSO error but are also due to DHS interpretations that may change without warning and get applied retroactively, to our detriment. Updates to USCIS interpretation of employer-employee relationships, for example, may retroactively invalidate an arrangement that I worked under during my OPT training period. The proposed policy memo would result in accrual of unlawful presence retroactively, during a period of time when USCIS policy was different or unclear.</p> <p>Furthermore, the extensive processing times for H-1B change of status petitions, combined with the suspension of premium processing for cap-subject H-1B applications, puts students like me at risk of having accrued unlawful presence for more than six months by the time USCIS has adjudicated my H-1B application and made a determination on whether I have maintained proper status. The extensive service center backlogs, suspension of premium processing, and sudden change in unlawful presence interpretation are all beyond the control of F-1 students. Under this memo, I may be determined to have unknowingly accrued several months of unlawful presence, and a possible 3- or 10-year bar against re-entry, without having possessed the intent to do so, and without any means to remedy my situation once I become aware of it.</p> <p>The accrual of unlawful presence calculation is currently linked to an adverse determination by DHS or an immigration judge (or by the expiration of an I-94) because such a determination actively puts the student on notice that he or she was no longer authorized to stay and/or work in the U.S., and should depart immediately. The calculation under this proposed memo will put students like me in a position to have possibly accrued several months of unlawful presence unknowingly. It is further exacerbated by the fact that their accrual of unlawful presence may have been endorsed by my school's DSO, the main immigration-related official that I have any contact with and on whom I rely. The application of the proposed memo will unfairly penalize students like me who have acted in good faith, who timely applied for work authorization, and acted according to the policies in effect at the time. It will affect our ability to apply for any other nonimmigrant visa in the U.S., as well as prevent us from applying for a visa at a consulate abroad due to the inadmissibility bar.</p> <p>It is not my intention to overstay my visa or to be unlawfully present in the U.S. I have come to study in the U.S. in order to gain a higher education in America's universities, and to supplement my education through hands-on work experience. My intention is to do so by complying with the relevant immigration regulations and policies. However, when those policies are not always clear, and my studies or work experience are being endorsed by the school's DSO, I feel I should not be penalized</p>	

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	<p>retroactively when I have acted in good faith and am informed later that there was a problem with my maintenance of status. I would advocate for the continuation of the current calculation of accrual of unlawful presence for F-1 individuals, which would allow for clear notice to the F-1 student concerning a failure to maintain proper status, a clear start date for the accrual of unlawful presence, and application of a re-entry bar only after remaining in the U.S. for a significant period beyond that notice. This calculation is equitable and avoids disproportionately penalizing students who have acted in good faith, and would allow us an opportunity to remedy our visa status once we become aware of the problem by being able to depart the U.S. as soon as we become aware that unlawful presence has begun to accrue.</p> <p>I urge against the implementation of this proposed policy memo. Thank you for your consideration, time, and support in this matter.</p> <p>Sincerely,</p>	
<p>Cyrus D. Mehta www.cyrusmehta.com [REDACTED] New York, NY [REDACTED] [REDACTED]</p>	<p>Dear USCIS:</p> <p>There has always been a strict distinction between violating status and being unlawfully present in the United States. One can be in violation of status without being unlawfully present. Even if an F, J and M student dropped out of school or engaged in unauthorized work, he or she would be considered to have been in violation of status but not accruing unlawful presence. This is because an F, M and J nonimmigrant is usually admitted for a Duration of Status (D/S) rather than up to a certain date. An F, M or J can maintain status so long as they remain enrolled in the educational institution or participate in activities pursuant to that status, which is why they are admitted under D/S. On the other hand, one who is the beneficiary of an approved H-1B or L nonimmigrant petition is admitted only up to the validity date of the petition. F, M and J nonimmigrants are not beneficiaries of prior approved petitions filed by sponsors.</p> <p>The new policy states various ways in which F, J, and M nonimmigrants and their dependents begin accruing unlawful presence. For example, F, J, and M nonimmigrants who failed to maintain nonimmigrant status before August 9, 2018, will start accruing unlawful presence based on that failure on August 9, 2018, unless the nonimmigrant had already started accruing unlawful presence based on several scenarios under the prior policy discussed below.</p> <p>Individuals who have accrued more than 180 days of unlawful presence during a single stay, and then depart, may be subject to 3-year or 10-year bars to admission, depending on how much unlawful presence they accrued before they departed the United States. See INA 212(a)(9)(B)(i)(I) & (II).</p> <p>Individuals who have accrued a total period of more than one year of unlawful presence, whether in a single stay or during multiple stays in the United States, and who then reenter or attempt to reenter the United States without being admitted or paroled, are permanently inadmissible. See INA</p>	

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	<p>212(a)(9)(C)(i)(1).</p> <p>The new policy supersedes existing policy, which is that foreign students (F nonimmigrants) and exchange visitors (J nonimmigrants) who were admitted for, or present in the United States in, Duration of Status started accruing unlawful presence on the day after USCIS formally found a nonimmigrant status violation while adjudicating a request for another immigrant benefit or on the day after an immigration judge ordered the applicant excluded, deported, or removed (whether or not the decision was appealed), whichever came first. F and J nonimmigrants, and foreign vocational students (M nonimmigrants), who were admitted until a specific date certain accrued unlawful presence on the day after their Form I-94 expired, on the day after USCIS formally found a nonimmigrant status violation while adjudicating a request for another immigration benefit, or on the day after an immigration judge ordered the applicant excluded, deported, or removed (whether or not the decision was appealed), whichever came first.</p> <p>By contrast, one admitted under an approved H-1B or L visa petition up to a certain date starts accruing unlawful presence after remaining beyond that date while a student who was admitted under D/S did not unless there was a violation of status finding by the USCIS or by an immigration judge. This holds true even with respect to a nonimmigrant admitted under a date certain visa. If the H-1B or L nonimmigrant violates status during the validity period of the admission, he or she will be in violation of status but will not accrue unlawful presence unless there is a formal finding by the USCIS or an immigration judge.</p> <p>The prior policy made more sense, and maintained the important distinction between maintenance of status and lawful or unlawful presence. The 3 and 10 year bars, or the permanent bar, are extremely draconian and should only be triggered when the nonimmigrant goes beyond a date certain expiration date. This is consistent with the statutory definition of unlawful presence under 212(a)(9)(B)(ii), which provides:</p> <p>"...an alien is deemed to be unlawfully present in the United States if the alien is present in the United States if the alien is present in the United States after the expiration of the period of stay authorized by the Attorney General or is present in the United States without being admitted or paroled"</p> <p>The new policy blurs the difference between being out of status and unlawfully present. Unlawful presence ought to only trigger when one goes beyond an expiration date and not when there is a contestable violation of status. If a student in F status is in violation of that status, he or she can be placed in removal proceeding and may contest the allegation in the proceeding. If the Immigration Judge orders the person removed based on the violation, then the unlawful presence period may commence upon the order. Similarly, when one who is in F status applies for a change of status, and the USCIS finds that the applicant violated status, which the applicant may have been able to contest,</p>	

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	<p>unlawful presence may commence after such a finding.</p> <p>Under the new policy, a nonimmigrant in F, J or M status may have unwittingly violated that status by not pursuing a full course of study or engaging in an unauthorized activity, and may never get notice of it until much later. Even F-1 students in post-completion practical training could potentially be deemed later to have engaged in unauthorized activity, such as not working in an area consistent with their field of study or a STEM trainee being placed at a third party client site, which USCIS has without notice abruptly disfavored, or if a school's curricular practical training does not meet the USCIS's subjective interpretation of whether the school was in compliance when it authorized such training. In the meantime, this person would have started accruing unlawful presence and triggered the 10 year bar to reentry upon departing the United States. The dependent spouse would also unfairly accrue unlawful presence as a result of a status violation by the principal spouse. This individual may never get a chance to contest the violation of status after the fact. Unlawful presence should only trigger when there is clear notice of remaining beyond an expiration date of authorized stay in the United States and not when there is a contestable allegation of violation of status. An F, J or M nonimmigrant is now in a worse off position than say an H-1B nonimmigrant admitted under a date certain validity period. A violation of status by the H-1B nonimmigrant during the period of authorized stay would not trigger unlawful presence. Even after 9/11, when immigration policies concerning students were tightened, we did not see such a cynical change in policy for students as now where they may not know in time of a status violation only to later realize they have unwittingly accrued unlawful presence triggering the 10 year bar.</p> <p>Accordingly, please keep intact the current policy on unlawful presence relating to F, J and M Nonimmigrants. It has worked well and has been more fair to F, J and M Nonimmigrants than the proposed new policy. Besides potentially unfairly penalizing foreign students already here, the new policy will also deter foreign students from coming to the United States, thus depriving our educational institutions and the nation from their unique talents and contributions.</p> <p>Sincerely,</p>	
Lianne Ahmughirah, M.Ed., MLA  @ 	<p>Dear Director Cissna:</p> <p>We are concerned with the proposed changes to the timing of accrual of unlawful presence for F, J, and M Nonimmigrants. Our comment is focused on F nonimmigrants.</p> <p>F-1 students are allowed to enter the U.S. for duration of status. During their time in the United States, they go through many processes: employment authorizations, transfers, extensions, reduced course</p>	

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	<p>loads, etc. Due to lack of clarity in the interpretation of regulations, it is difficult for schools to know exactly what is the correct action in all situations. Schools are often given inconsistent answers from various divisions and representatives of DHS. It is, therefore, possible that a student could be advised, in good faith, by a DSO that the student's actions are correct, but are later found by DHS to have violated their status. The student would have no warning until after they have already accrued excessive amounts of unlawful presence. This is not fair to the student.</p> <p>We believe that reinstatements would be particularly problematic under the proposed changes. The waiting period for processing reinstatement applications is extensive. If the reinstatement is ultimately denied, the student could accrue 6-12 months of unlawful presence while waiting. This contradicts the concept that an applicant with a pending application to USCIS is lawfully present during the processing time. Therefore, we recommend that the accrual date for unlawful presence should begin on the date they receive their denial letter, as is the current policy.</p> <p>Additionally, we are concerned that the Department of Homeland Security might not always be able to verify the departure of an F-1 student from the United States in a timely manner, or at all in some cases. This could unfairly impact a student who departed the United States according to the rules. Departure information must be correctly and consistently updated in SEVIS before this policy can be implemented.</p> <p>Our recommendation is that the proposed policy "Accrual of Unlawful Presence and F, J, and M Nonimmigrants" (PM-602-1060) not be implemented.</p> <p>Thank you for your consideration.</p> <p>Sincerely,</p>	
<p>Shine Zhou [REDACTED]@[REDACTED]</p>	<p>Dear Director:</p> <p>I would like to submit the following comments in response to the USCIS Proposed Policy Memo "Accrual of Unlawful Presence and F, J, and M Nonimmigrants" (PM-602-1060), posted on May 11, 2018.</p> <p>My concern with the proposed memorandum is that its new calculation of accrual of unlawful presence may jeopardize many students' ability to obtain a nonimmigrant visa from a consulate. By essentially equating unlawful presence with failure to maintain proper status, the policy memo puts an undue burden on F-1 students and penalizes them retroactively. The new calculation would render F-1 students unlawfully present dating back to the day after a failure to maintain F-1 status began, rather</p>	

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	<p>than from the day of an adverse decision by DHS or an immigration judge.</p> <p>This is an undue burden and disproportionate penalty on us F-1 students because the policies for maintaining proper F-1 status have not always been made uniformly clear to us, or even to our DSOs. As an F-1 student, I rely heavily on my school's DSO in order to maintain valid status, as he or she issues my I-20s, endorses the I-20s for work authorization, and updates my records in the SEVIS system. F-1 students may have engaged in certain employment activities with the full endorsement of their school's DSO, and issuance of an Employment Authorization Document by DHS, only to discover later that the initial grant of work authorization was improper.</p> <p>These inconsistencies are sometimes due to DSO error but are also due to DHS interpretations that may change without warning and get applied retroactively, to our detriment. Updates to USCIS interpretation of employer-employee relationships. The proposed policy memo would result in accrual of unlawful presence retroactively, during a period of time when USCIS policy was different or unclear. Furthermore, the extensive processing times for H-1B change of status petitions, combined with the suspension of premium processing for cap-subject H-1B applications, puts students at risk of having accrued unlawful presence for more than six months by the time USCIS has adjudicated my H-1B application and made a determination on whether I have maintained proper status. The extensive service center backlogs, suspension of premium processing, and sudden change in unlawful presence interpretation are all beyond the control of F-1 students. Under this memo, many students may be determined to have unknowingly accrued several months of unlawful presence, and a possible 3- or 10-year bar against re-entry, without having possessed the intent to do so, and without any means to remedy my situation once I become aware of it.</p> <p>The accrual of unlawful presence calculation is currently linked to an adverse determination by DHS or an immigration judge (or by the expiration of an I-94) because such a determination actively puts the student on notice that he or she was no longer authorized to stay and/or work in the U.S., and should depart immediately. The calculation under this proposed memo will put students in a position to have possibly accrued several months of unlawful presence unknowingly. It is further exacerbated by the fact that their accrual of unlawful presence may have been endorsed by my school's DSO, the main immigration-related official that I have any contact with and on whom I rely. The application of the proposed memo will unfairly penalize students who have acted in good faith, who timely applied for work authorization, and acted according to the policies in effect at the time. It will affect their ability to apply for any other nonimmigrant visa in the U.S., as well as prevent us from applying for a visa at a consulate abroad due to the inadmissibility bar.</p> <p>Many students come to study in the U.S. in order to gain a higher education in America's universities, and to supplement my education through hands-on work experience. However, when those policies are not always clear, and their studies or work experience are being endorsed by the school's DSO, I feel I</p>	

STAKEHOLDER/ ORGANIZATION	STAKEHOLDER COMMENTS	ORIGINATING OFFICE'S RESOLUTIONS
	<p>should not be penalized retroactively when I have acted in good faith and am informed later that there was a problem with my maintenance of status. I would advocate for the continuation of the current calculation of accrual of unlawful presence for F-1 individuals, which would allow for clear notice to the F-1 student concerning a failure to maintain proper status, a clear start date for the accrual of unlawful presence, and application of a re-entry bar only after remaining in the U.S. for a significant period beyond that notice. In order to avoid disproportionately penalizing students who have acted in good faith, and would allow us an opportunity to remedy our visa status once we become aware of the problem by being able to depart the U.S. as soon as we become aware that unlawful presence has begun to accrue.</p> <p>I urge against the implementation of this proposed policy memo. Thank you for your consideration, time, and support in this matter.</p> <p>Sincerely,</p>	
<p>Krishnaraje Chauhan [REDACTED]@[REDACTED]</p>	<p>Dear Director:</p> <p>I would like to submit the following comments in response to the USCIS Proposed Policy Memo "Accrual of Unlawful Presence and F, J, and M Nonimmigrants" (PM-602-1060), posted on May 11, 2018.</p> <p>I am an F-1 international student who has recently graduated from Northwestern Polytechnic University and am working based on Optional Practical Training (OPT). My employer has recently petitioned for my H-1B work visa during the cap-subject application period in April.</p> <p>My concern with the proposed memorandum is that its new calculation of accrual of unlawful presence may jeopardize my ability to obtain a nonimmigrant visa from a consulate. By essentially equating unlawful presence with failure to maintain proper status, the policy memo puts an undue burden on F-1 students and penalizes them retroactively. The new calculation would render F-1 students unlawfully present dating back to the day after a failure to maintain F-1 status began, rather than from the day of an adverse decision by DHS or an immigration judge.</p> <p>This is an undue burden and disproportionate penalty on us F-1 students because the policies for maintaining proper F-1 status have not always been made uniformly clear to us, or even to our DSOs. As an F-1 student, I rely heavily on my school's DSO in order to maintain valid status, as he or she issues my I-20s, endorses the I-20s for work authorization, and updates my records in the SEVIS system. F-1 students may have engaged in certain employment activities with the full endorsement of their school's DSO, and issuance of an Employment Authorization Document by DHS, only to discover later that the initial grant of work authorization was improper.</p> <p>These inconsistencies are sometimes due to DSO error but are also due to DHS interpretations that may change without warning and get applied retroactively, to our detriment. Updates to USCIS interpretation of employer-employee relationships, for example, may retroactively invalidate an</p>	

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	<p>arrangement that I worked under during my OPT training period. The proposed policy memo would result in accrual of unlawful presence retroactively, during a period of time when USCIS policy was different or unclear.</p> <p>Furthermore, the extensive processing times for H-1B change of status petitions, combined with the suspension of premium processing for cap-subject H-1B applications, puts students like me at risk of having accrued unlawful presence for more than six months by the time USCIS has adjudicated my H-1B application and made a determination on whether I have maintained proper status. The extensive service center backlogs, suspension of premium processing, and sudden change in unlawful presence interpretation are all beyond the control of F-1 students. Under this memo, I may be determined to have unknowingly accrued several months of unlawful presence, and a possible 3- or 10-year bar against re-entry, without having possessed the intent to do so, and without any means to remedy my situation once I become aware of it.</p> <p>The accrual of unlawful presence calculation is currently linked to an adverse determination by DHS or an immigration judge (or by the expiration of an I-94) because such a determination actively puts the student on notice that he or she was no longer authorized to stay and/or work in the U.S., and should depart immediately. The calculation under this proposed memo will put students like me in a position to have possibly accrued several months of unlawful presence unknowingly. It is further exacerbated by the fact that their accrual of unlawful presence may have been endorsed by my school's DSO, the main immigration-related official that I have any contact with and on whom I rely. The application of the proposed memo will unfairly penalize students like me who have acted in good faith, who timely applied for work authorization, and acted according to the policies in effect at the time. It will affect our ability to apply for any other nonimmigrant visa in the U.S., as well as prevent us from applying for a visa at a consulate abroad due to the inadmissibility bar.</p> <p>It is not my intention to overstay my visa or to be unlawfully present in the U.S. I have come to study in the U.S. in order to gain a higher education in America's universities, and to supplement my education through hands-on work experience. My intention is to do so by complying with the relevant immigration regulations and policies. However, when those policies are not always clear, and my studies or work experience are being endorsed by the school's DSO, I feel I should not be penalized retroactively when I have acted in good faith and am informed later that there was a problem with my maintenance of status. I would advocate for the continuation of the current calculation of accrual of unlawful presence for F-1 individuals, which would allow for clear notice to the F-1 student concerning a failure to maintain proper status, a clear start date for the accrual of unlawful presence, and application of a re-entry bar only after remaining in the U.S. for a significant period beyond that notice. This calculation is equitable and avoids disproportionately penalizing students who have acted in good faith, and would allow us an opportunity to remedy our visa status once we become aware of the</p>	

Accrual of Unlawful Presence and F, J, and M Nonimmigrants

Stakeholder Comments Matrix

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	<p>problem by being able to depart the U.S. as soon as we become aware that unlawful presence has begun to accrue.</p> <p>I urge against the implementation of this proposed policy memo. Thank you for your consideration, time, and support in this matter.</p> <p>Sincerely,</p>	
<p>Allison Taylor Stuewe [REDACTED]@[REDACTED]</p>	<p>Hello,</p> <p>I am writing to express my deep concern about the proposed guidelines to change how days of unlawful presence are counted for International students. I want to express that both as a graduate student and as a graduate Teaching Assistant, I see the benefits international students bring to my academic community and to the US in general. The quality of our higher education is one of the US's greatest strengths and any changes that discourage the world's greatest from pursuing education here will surely hurt our country's standing in the international community in the long run.</p> <p>Thank you,</p>	
<p>Parita Lavingia [REDACTED]@[REDACTED]</p>	<p>Hello,</p> <p>As per this law, advancement of knowledge can be difficult or impossible for thousands of people. As this country provide large variety of courses in same field. But in the other side without working in real world, it's not possible apply knowledge and to find interest in field just based of theoretical knowledge. To improve practical knowledge, applications in the real world under responsibilities are important. Thus, CPT and OPT are major part in education with each master degree not just with first one. As each Master degree are different and requires hard work and knowledge in depth in theory as well as practical. That can be obtained only by CPT and OPT.</p> <p>I hope you consider my opinion.</p> <p>Thank you</p>	
<p>Andrew Ceraulo andrew.ceraulo@gmail.com</p>	<p>Please see my attached comments on the above memo.</p>	
<p>Dr. M. Duane Nellis President Ohio University [REDACTED]@[REDACTED]</p>	<p>Ohio University, Athens Ohio, a higher education institution serving students pursuing Bachelor through Doctoral degrees, writes in response to the U.S. Citizenship and Immigration Services (USCIS) policy memorandum of May 10, 2018, "Accrual of Unlawful Presence and F, J, and M Nonimmigrants." The memo is an unexpected and significant departure from more than 20 years of policy guidance. Ohio University respectfully requests that USCIS withdraw the memo and implement the recommendations provided below.</p> <p>The proposed change may lead to the incorrect identification of foreign students and exchange visitors</p>	

STAKEHOLDER/ ORGANIZATION	STAKEHOLDER COMMENTS	ORIGINATING OFFICE'S RESOLUTIONS
	<p>as failing to maintain lawful status, thus unfairly subjecting them to the proposed 3-year, 10-year, or permanent bars to re-entry to the United States. There has always been a strict distinction between violating status and being unlawfully present in the United States. One can be in violation of status without being unlawfully present. F, M, and J nonimmigrants are traditionally admitted for a Duration of Status (D/S) rather than up to a certain date and can maintain status so long as they remain enrolled in the educational institution or participate in activities pursuant to that status. Even if an F, J and M student dropped out of school or engaged in unauthorized work, he or she would be considered to have been in violation of status but not accruing unlawful presence. Unlawful presence should only trigger when there is clear notice of remaining beyond an expiration date of authorized stay in the United States and not when there is a contestable allegation of violation of status.</p> <p>Immigration law is complicated, and both compliance and enforcement is a very technical matter that requires training and expertise. Because of this complexity, a non-immigrant might not even know he or she is "out of status" until informed by the university or government. Most violations committed by international students are completely unintentional. For example, a student may register for an extra online class, not realizing s/he is violating the in-person credit requirement. These unintentional violations should not result in banishment from the United States without the students first being afforded a timely opportunity to resolve any status problems.</p> <p>In our view, the USCIS proposal will make the United States less competitive in attracting talented international students, scholars, and exchange visitors. As a result, we will lose critical contributions to groundbreaking research and the forging of diplomatic ties. Foreign students, scholars, and exchange visitors are here to learn, and they often become the nation's best ambassadors and allies. By implementing such severe punishment for minor or technical violations, we will be making America a less desirable place to study. This is contrary to our nation's values as a welcoming nation of immigrants.</p> <p>Further, USCIS could achieve the goal of reducing the number of nonimmigrants who violate immigration status or stay beyond the legally allowable period through the implementation of less severe policies within the sub-agencies of the Department of Homeland Security (DHS) and in collaboration with other federal agencies. These policy changes should be undertaken before resorting to a policy change that will apply the disproportionate punishment of the 3-year, 10-year, and permanent bars of admissibility to international students and exchange visitors, as well as their spouses and children.</p>	

STAKEHOLDER/ ORGANIZATION	STAKEHOLDER COMMENTS	ORIGINATING OFFICE'S RESOLUTIONS
	<p>Recommendations</p> <p>Ohio University supports the Association of International Educators' (NAFSA) recommendations as outlined below and in its comments provided on Friday May 25, 2018.</p> <ul style="list-style-type: none"> · Leave in place the current policy, which has served for over 20 years. If the agency wishes to amend this longstanding interpretation of the law, it should be done through the formal notice and comment process and consistent with the Administrative Procedure Act. · Do not implement any policy change until implementation has been fully coordinated with the Department of State and other DHS components such as U.S. Customs and Border Protection (CBP) and the Student and Exchange Visitor Program (SEVP). · Exclude from the unlawful presence tally any status violations that occurred under color of law, to avoid "gotcha" scenarios, where the student reasonably relied on the authorizations granted. For example, curricular practical training authorized in the Student and Exchange Visitor Information System (SEVIS) that DHS later determines may have been improperly given, should not start the unlawful presence "clock" until DHS or an immigration judge makes a formal status determination. · Apply the change of status/extension of stay tolling rules to reinstatement applications. · Expand the sections describing examples where F, M, and J nonimmigrants "do not accrue unlawful presence in certain situations." [Draft Adjudicator's Field Manual 40.9.2(b)(1)(E)(iii)]. <p>Thank you for the opportunity to comment.</p>	
<p>Sara B. Levin, Esq. e-mail: [REDACTED]@[REDACTED]</p> <p>Levin Santalone LLP [REDACTED] [REDACTED] Larchmont, New York Tel: [REDACTED] Fax: [REDACTED]</p>	<p>Thank you for taking the time to read my attached letter and considering my concerns.</p>	
<p>Paul Zoltan Law Office of Paul S. Zoltan [REDACTED] Dallas, Texas [REDACTED] Fax: [REDACTED]</p>	<p>Please find attached my comments upon the misguided change in policy regarding D/S violations and the unlawful presence bars.</p>	
<p>Molly Hoffinan International Student & Scholar Services</p>	<p>Please see the attached letter regarding USCIS's Draft Policy Memorandum: Accrual of Unlawful Presence and F, J, and M Nonimmigrants. Thank you.</p>	

Accrual of Unlawful Presence and F, J, and M Nonimmigrants

Stakeholder Comments Matrix

STAKEHOLDER/ ORGANIZATION	STAKEHOLDER COMMENTS	ORIGINATING OFFICE'S RESOLUTIONS
(ISSS) / University of Minnesota [REDACTED] Minneapolis, MN [REDACTED] Phone: [REDACTED] / Fax: [REDACTED]		
Christy Czerwien, M.A. International Student Counselor [REDACTED]@[REDACTED]	I am writing to express my opposition and concerns regarding the new policy memorandum, "Accrual of Unlawful Presence and F, J, and M Nonimmigrants," posted by U.S. Citizenship and Immigration Services (USCIS) on May 11, 2018. This action is of grave concern to the interests of the United States. Please see my attached signed <u>Letter of Opposition and Concern</u> . Thank you for your dutiful attention to this important matter.	
Sandra E. Torres Associate Counsel, Immigration & Int'l Services Office of the General Counsel University of Massachusetts [REDACTED] Shrewsbury, MA [REDACTED] Office: [REDACTED] [REDACTED]@[REDACTED]	Attached please find public <u>comment</u> submitted by the University of Massachusetts system on the USCIS policy memorandum Accrual of Unlawful Presence and F, J, and M Nonimmigrants. PM-602-1060.	
Marcia Taylor, M.A. Director, International Services SEVIS PDSO and RO USF World University of South Florida [REDACTED] Tampa, FL [REDACTED] P: [REDACTED] F: [REDACTED]	Please see my attached <u>comments</u> to PM-602-1060 Accrual of Unlawful Presence and F, J, and M Nonimmigrants.	
Adria Baker abaker@rice.edu	Please read my <u>letter</u> attached. Thank you.	
Kelley A. Chenhalls Attorney at Law CHENHALLS NISSEN, S.C. [REDACTED] Milwaukee, WI [REDACTED]	Please see <u>attached</u> .	

STAKEHOLDER/ ORGANIZATION	STAKEHOLDER COMMENTS	ORIGINATING OFFICE'S RESOLUTIONS
<p>P: [REDACTED] F: [REDACTED] E: [REDACTED]@ [REDACTED]</p> <p>Teresa E. Wise, Ph.D. Associate Provost International Education & Global Outreach Capstone International Center The University of Alabama [REDACTED] Tuscaloosa, AL [REDACTED] Office [REDACTED] Fax [REDACTED] [REDACTED]@ [REDACTED]</p>	<p>The University of Alabama writes in response to the U.S. Citizenship and Immigration Services (USCIS) policy memorandum of May 10, 2018, "Accrual of Unlawful Presence and F, J, and M Nonimmigrants." The University of Alabama recognizes and appreciates the many diligent efforts the Department of Homeland Security oversees to ensure national security. We share this commitment to ensuring the U.S. remains a safe and welcoming place for all, including our international students and scholars.</p> <p>The University of Alabama is concerned that without further review and collaboration with higher education stakeholders, this policy will lead to unnecessary harm to students, scholars, and institutions. We ask that USCIS withdraw the memo in consideration of the concerns below and implement the recommendations outlined here.</p> <p>The University of Alabama is home to a large population of international students, research scholars, and employees, individuals who collectively represent more than 80 countries of origin, multiple language groups, religions, academic expertise, and life experiences. The importance of international students and exchange visitors at The University of Alabama and to the State of Alabama cannot be overstated.</p> <p>International students, guest researchers, and faculty bring global perspectives to our classrooms and contribute to a greater understanding of the world for our graduates. Our international researchers drive innovation and provide integral support for The University of Alabama's heavy engagement in economic development for the state of Alabama. The diversity of perspectives in our classrooms, labs, and in the communities statewide produces greater innovations in science and technology, and can strengthen understanding of world history, popular movements, and current trends and topics. International individuals also provide a global perspective to American students, enabling all students to gauge their competencies in the global workplace.</p> <p>In addition to the positive academic and research benefits, international students contributed \$37 billion to the U.S. economy last year and were responsible for the creation of more than 450,000 jobs. 9549 international students studied in Alabama last year, contributing 262.9 million dollars to the Alabama state economy. The University of Alabama international students alone contributed \$46.4 million dollars to the local economy and supported 609 jobs (NAFSA, 2018).</p>	

STAKEHOLDER/ ORGANIZATION	STAKEHOLDER COMMENTS	ORIGINATING OFFICE'S RESOLUTIONS
	<p>Recognizing the value of international students and scholars, we also recognize the additional risks and potential costs associated with implementation of this policy. As a sponsor of student and exchange visitor visas, The University of Alabama relies heavily on the U.S. government to enact fair and well-executed policies that allow international students and scholars to pursue their goals without distractions or interruptions. The University of Alabama has concerns that the complexities of implementing this policy currently exceed the government's ability to effectively execute and properly inform F and J visa holders of the accrual of unlawful presence.</p> <p>Concerns:</p> <ol style="list-style-type: none"> 1. Conflation of the concepts of "failure to maintain status and unlawful presence" <p>With the current distinction between unlawful presence and maintenance of status an exchange visitor of F student visa holder is admitted to the U.S. for the duration of status (D/S) and is not subject to unlawful presence without appropriate due process and notification from a federal judge of removal proceedings. As it stands now, it is possible for an F or J visa holder who fails to maintain status to work with their institutional sponsor to take corrective action to reinstate status, which is especially necessary for infractions for which they are unaware. Under the proposed policy change, an individual who has unknowingly violated status may not be aware of the accrual of unlawful presence, not receive adequate communication about the accrual of unlawful presence, and be subject to the 3 year, 10 year, or permanent bars on re-entry.</p> <ol style="list-style-type: none"> 2. Retroactive Assignment of Unlawful Presence Accrual <p>The proposed policy change includes a provision that would allow the USCIS to assign unlawful presence accrual retroactively. In cases where an individual unknowingly violated status, this retroactive accrual of unlawful presence could make the individual subject to re-entry bars without proper notice at the time of the status violation, preventing the F or J visa holder from taking corrective action.</p> <ol style="list-style-type: none"> 3. Reliance on SEVIS and other Faulty Government Databases <p>There are routine human and machine errors in SEVIS, CLAIMS, SAVE, and other government databases. Assigning accrual of unlawful presence based on data available in these databases without due process and a holistic look at evidence could result in harm to F and J visa holders.</p>	

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	<p>4. Disproportionate Penalty to Infraction</p> <p>The accrual of unlawful presence and assignment of a re-entry bar preventing an F or J visa holder from returning to their program of study or research is a harsh penalty to impose for minor infractions associated with maintaining status.</p> <p>5. Punishment for Designated School Official (DSO) or Alternate Responsible Officer (ARO) Error</p> <p>Sometimes, loss of status is not due to a student's own action or inaction. There are times when an error on the part of the DSO or ARO leads to loss of status for the student. This is especially true of DSOs and AROs at small institutions and in the K-12 arena, where access to training and adequate resources for proper advising are real issues.</p> <p>The risks to the institution of faulty execution are outlined below:</p> <p>1. Academic</p> <p>The University of Alabama recruits heavily for top academic talent from the U.S. and abroad to fulfill its academic mission and responsibilities as the flagship institution for the State of Alabama. International students serve as research and teaching assistants to the institution, assisting the institution with producing global learning outcomes for all graduates to compete in a globalized 21st century workplace. International research scholars collaborate on global and local research projects and innovations. If this policy creates fear and uncertainty around studying or researching in the U.S. top academic prospects will choose to study in other countries with more supportive and attractive immigration policies. The loss of international students and research scholars in our university labs and classrooms would directly affect The University of Alabama's ability to prepare Alabamian students for the jobs of tomorrow, and affect the university's ability to meet the needs of economic development and research innovation today.</p> <p>2. Financial</p> <p>International students are a large revenue producer for the institution with tuition and fees estimated at \$29,050 per student. In addition, international students and researchers contribute to the university's ability to secure grant funding which drives academic research and innovation. Instability and uncertainty in immigration is correlated with declining international student enrollment nationwide which creates a financial insecurity for the university.</p>	

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	<p>3. Legal The international students and research scholars The University of Alabama attracts come to the U.S. to pursue academic goals and are not immigration experts. As such, the burden of ensuring that international students and scholars are well informed and supported in the area of immigration falls on the institution. The University of Alabama staffs the International Student & Scholar Services office with knowledgeable immigration advisors able to offer guidance on maintenance of status and benefit eligibility. However, the nuanced areas of what constitutes unlawful presence is normally the domain of qualified immigration attorneys. The relationship between what legal advice is appropriate for an institution to provide to students and scholars, and what an external immigration attorney should handle will be an additional burden for institutions to manage.</p> <p>4. Reputational Finally, the effects of implementing a rushed policy with no formal plan or implementation strategy beyond relying on unreliable data systems, creates a situation ripe for harm to international students and scholars. In cases where our international students and scholars experience challenges, The University of Alabama must communicate clearly, consistently, and with certainty to maintain a positive institutional reputation with all stakeholders, including international students and scholars. Implementing this policy change without adequate technology and guidance will lead to inconsistencies in government practice and case-by-case exceptions.</p> <p>We request that you consider the concerns outlined above. We also support and advocate for the recommendations outlined in NAFSA's public comment on the rule linked here: http://www.nafsa.org/_/file/_/amresource/NAFSAulpcomment20180524.pdf?_ga=2.141167282.1207322518.1528131025-1858207952.1527259631</p> <p>Thank you for the opportunity to comment.</p>	
Robert Christl [REDACTED]@[REDACTED]	Please find attached the <u>comment</u> of the Teaching Assistants Association, the graduate student labor union, at the University of Wisconsin-Madison regarding USCIS' proposed policy change regarding international students' visas. Thank you.	
Karen F. Da Silva, MS International Student Concerns Advocate National Association of Graduate- Professional Students (NAGPS) [REDACTED] Washington, DC [REDACTED] [REDACTED]@[REDACTED]	We, the leaders, members, and supporters of the higher education community, are writing to express our concerns with the policy memorandum "Accrual of Unlawful presence and F, J, and M Nonimmigrants" published on May 10, 2018 in the U.S. Citizenship and Immigration Services (USCIS) website. We would like to request USCIS to withdraw the proposal of change in the policy, and continue the current policy to count the accrual of unlawful presence of students and visiting scholars under the F, J, and M visa-types after a formal notification of the finding of the status violation.	

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	<p>As most of enrolled students in U.S. Institutions, international graduate and professional students are expected not only to take certain credit hours of classes, but are also often required to take supplementary appointments as interns, research interns, field workers, and sometimes community service to complete their degrees successfully. And as such, it is important to ensure that these requirements are legally accepted by the immigration agencies in the country. Under the presented changes in the policy memorandum, any failure in maintaining their non-immigration status in accordance with the immigration federal agencies due to an accidental mistake in setting the requirements, e.g. for credit-hours or for choosing their internship, can cost to these students their career success and unfairly penalize them to re-entry in the United States. As students, these individuals need much more flexibility, assistance, and support from the immigration agencies and authorities in order to be able to complete their degrees and continue to serve as an indispensable workforce in the US.</p> <p>Another important issue upon acceptance of their visa application, these students also seize various documents with distinct information (e.g. visas stamped in the passports with different issued expiration dates as in certificates issued by their schools) which can be subjected to misinterpretation from immigration personnel or school officers, aggravating the complexity to maintain the student's legal status.</p> <p>Given the aforementioned operational complexities which can lead these students to accidentally violate their status, it is important to have an a written official warning that the alien has failed to maintain her/his legal immigration status and stating the proper reasons. The official warning will not only help our international students and scholars to plan their actions in order to obtain a lawful status or leave the country, but it will also facilitate the immigration authorities to start any further legal processes. Finally, it goes without saying that we are also supportive of the penalties mentioned in the current policy stating that people who persist staying after such a formal notice should be penalized by not being able to return to the United States for 3-10 years.</p> <p>International students are an important part of the U.S. Higher Education and economy as they contributed nearly \$37 billion to the U.S. economy, and created or supported more than 450,000 jobs during the 2016-2017 academic year. In 2017, approximately 5% of the total students enrolled in the U.S. Institutions were non-immigrants, from which about half of them represented graduate students. These highly-skilled graduate students are confining their degrees and expertise to provide innovation and solutions to the American needs, mostly in areas such as science, math, engineering, and</p>	

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	<p>technology which sometimes cannot be favored by domestic students. Unfortunately, since 2011 there has been a decline of approximately 21% in international students enrollment as these talented foreign students are being enticed to study in other countries with more attractive student visa policies. The proposed policy will deepen this problem by encouraging these students to look elsewhere even further to pursue their degrees or research.</p> <p>To this end, we urge USCIS, DHS, SEVP, and other immigration federal agencies to provide periodic notifications to school-officials, relevant federal offices about the status of international students and scholars under F, J, M, type-visas in order to facilitate the communication and strict implementation of the existing immigration policies.</p> <p>Thank you for the opportunity to provide our comments on this proposed policy update. Should you wish to speak with someone further regarding this issue, please feel free to contact Karen Da Silva, International Student Concerns Advocate for the National Association of Graduate-Professional Students (NAGPS), iscc@nagps.org.</p>	
Jane Kalionzes Associate Director International Student Center [REDACTED]@[REDACTED]	Attached please find my comments on the memo mentioned above.	
Stuart Anderson Executive Director National Foundation for American Policy [REDACTED]@[REDACTED]	Please find attachments responsive to the May 10, 2018 "Accrual of Unlawful Presence and F, J and M Nonimmigrants" memorandum. Additional Attachment	
Diane Butler Davis Wright Tremaine LLP Partner, Immigration Law [REDACTED] WA [REDACTED] Tel: [REDACTED] Cell: [REDACTED] Fax: [REDACTED] Email: [REDACTED]	Attached please find my comment on the USCIS Policy Memorandum: Accrual of Unlawful Presence and F, J, and M Nonimmigrants.	
Miriam Feldblum Executive Director Presidents' Alliance on Higher Education and Immigration	Dear Director Cissna, The Presidents' Alliance on Higher Education and Immigration writes in response to the U.S. Citizenship and Immigration Services (USCIS) policy memorandum of May 10, 2018, "Accrual of	

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<p>Office phone: [REDACTED] [REDACTED]@ [REDACTED]</p>	<p>Unlawful Presence and F, J, and M Nonimmigrants,” to express our grave concerns with the new guidance and to request that USCIS withdraw the memo. The new guidance will have significant adverse impacts on international students and scholars, and will greatly harm our colleges’ and universities’ ability to recruit and retain international talent.</p> <p>The memo is a significant departure from long-standing agency interpretation. The memo changes the interpretation that USCIS (and previously INS) have followed since implementation of the 1996 changes to the governing Immigration and Nationality Act. In doing so, it abandons 20 years of fairly consistent agency interpretation. The concerns cited in the memo regarding overstays can be addressed in ways that do not require a major shift in policy.</p> <p>We believe the memo overstates the problem and rate of overstays. The memo estimates the “total overstay rate was 6.19 percent for F nonimmigrants, 3.80 percent for J nonimmigrants, and 11.60 percent for M nonimmigrants” based on a 2017 DHS report (“Fiscal Year 2016 Entry/Exit Overstay Report”), and on that basis, identifies the reduction of “overstays” as a key justification for the new policy. However, a 2018 study by the demographer Robert Warren, shows that the 2017 DHS study was based on faulty data and analysis. In his study, Warren details how DHS greatly overestimated the number of overstays for approximately 30 countries, and that “slightly more than half” of the DHS overstays actually included those who departed the country, but their departures were not recorded. Warren concludes that the “actual number of overstays in 2016 was about half of the number estimated by DHS” (R. Warren, “DHS Overestimates Visa Overstays for 2016: Overstay Population Growth Near Zero During the Year,” Journal of Migration and Human Security, JMHS Volume 5 Number 4 (2017): 768-779). We request that USCIS conduct a more thorough analysis of overstays, and explore ways to improve verification of departures of temporary visitors and (F-1, J-1, M-1) visa holders before implementing the new policy laid out in the memo.</p> <p>The new guidance is operationally very complex and will likely result in increased numbers of foreign students, exchange visitors, and scholars being found to have failed to maintain lawful presence, and thus potentially subjecting them to 3-year, 10-year, or permanent bars to re-entry to the United States. Such failures could be due to unwitting, minor or technical errors committed by themselves or college administrators; indeed, the international students or scholars may not even be aware that they have started to accrue unlawful presence. Under the current system, when a small human error, misinterpretation, or technical glitch in SEVIS occurs, our staff and students are able to make corrections and request reviews and adjustments, without fearing the accrual of unlawful presence.</p> <p>The implications of this new policy are substantial and highly concerning. American colleges and</p>	

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	<p>universities excel because we can attract talent from everywhere. Our campuses are dedicated to attracting, educating, and graduating students from all backgrounds and places. Our institutions can attest to the vital contributions of our international students and scholars on our campuses and in our communities. However, this new policy, with its harsh, unforgiving interpretations of existing law, could deter international students and scholars from coming to study and work here, and from contributing their talents, energy, and innovative ideas to the United States.</p> <p>Thus, on behalf of the Presidents' Alliance on Higher Education and Immigration, a non-partisan alliance of now over 365 college and university presidents and chancellors, representing public and private institutions from across the nation, we urge USCIS to withdraw this new policy, and work with us and others in higher education to develop appropriate, sensible practices to address any concerns that you may have with regard to overstays and international students and exchange visitors.</p> <p>Sincerely,</p>	
Julia Siu [REDACTED]@[REDACTED]	Please see attached comments.	
Katie Ahlman [REDACTED]@[REDACTED]	Please see attached comments.	
Margaret Key [REDACTED]@[REDACTED]	Please see attached comments.	
Louise M. Baldwin [REDACTED] Ann Arbor, MI [REDACTED] (direct) [REDACTED]@[REDACTED]	Please see attached comments.	
Robyn Brown [REDACTED]@[REDACTED]	Please see attached comments.	
Meghan Popick [REDACTED]@[REDACTED]	<p>Dear Director Cissna,</p> <p>My name is Meghan Popick, and I am a member of NAFSA: Association of International Educators. I have been in the field of international education for over ten years, and I feel that it is extremely important that I comment on the USCIS policy memorandum of May 10, 2018, "Accrual of Unlawful Presence and F, J, and M nonimmigrants." As stated by my professional organization, NAFSA, this memo "is an abrupt, radical departure from more than 20 years of policy guidance," which will have</p>	

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	<p>devastating effects on international student and scholars who contribute so much to the United States' economy, culture, research, and education system. For the reasons outlined below, I request that USCIS withdraw the memo.</p> <p>Firstly, the memo ends a long-standing distinction between violating one's immigration status and being unlawfully present in the US. If this policy goes into effect, students and exchange visitors who fall out of status (sometimes to no fault of their own or without their knowledge) would be subject to 3-year, 10-year, or permanent bars. They would become subject to these bars for reentry without a clear notice from a government agency or immigration judge stating they are accruing days of unlawful presence. Currently, nonimmigrants begin to accrue unlawful presence when there has been a formal finding of status violation made in the course of a DHS benefits determination or by an immigration judge. This sort of warning clearly states that the "clock is ticking," but the proposed policy change allows for ambiguity and is objectively unfair.</p> <p>Additionally, the fairness of this policy comes into question as accruing days of unlawful presence will likely be a far greater penalty than the reason the student or exchange visitor fell out of status. In other words, the punishment will not match the crime. For example, most international students fall out of status because of small infractions such as dropping below full time enrollment or being withdrawn from their classes due to a late tuition payment. These very small and easily fixed violations do not warrant the type of punishment that is being proposed in this policy memo especially since under enrollment is sometimes the result of illness, improper advising by the student's academic advisor, administrative error, or slow international wire transfers. This is just one of many examples in which the penalty is far greater than the violation.</p> <p>As stated before, F, M, and J nonimmigrants contribute so much to the US economy, and I fear that policy changes like this one will reduce their significant economic impact. In 2016-2017 alone, international students studying in the US contributed \$36.9 billion dollars to the US economy and created or supported 450,000 jobs.* However, schools across the country are reporting lower and lower international applicant and enrollment rates which are a direct result of recent policy changes and proposed changes such as this one.</p> <p>This proposed policy is just one more example of changes to the F, J and M visa categories that makes the United States less and less desirable for international students and scholars. Other countries including Canada, Australia, the United Kingdom, and China are actively recruiting international students and scholars away from the US as they clearly see the economic, academic, and cultural benefits that these individuals bring to their countries. In fact, they are making the processes easier and benefits greater in order to attract international students and scholars to their institutions.</p> <p>In addition to the unintended economic impact this policy will have, the proposed change will also make the US less safe from a national security perspective as international students and scholars are the</p>	

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	United States' best ambassadors and allies. By implementing policies that make the US a less desirable location for study and research, the US will miss out on these important diplomatic opportunities; making the US less safe long term. Thank you for the opportunity to comment. Sincerely,	
Hanan Saab [REDACTED] Washington, D.C. [REDACTED] [REDACTED]@[REDACTED]	Please see attached comments.	
Tabetha Malv [REDACTED] Oxford, OH [REDACTED] USA Phone: [REDACTED] [REDACTED]@[REDACTED]	Please see attached comments.	
Scott Corley Executive Director Compete America [REDACTED] [REDACTED]@[REDACTED]	Please see attached comments.	
Tana Liu-Beers Immigration Legal Counsel Disciples Home Missions, Christian Church (Disciples of Christ) [REDACTED], Durham, NC [REDACTED] office/cell/WhatsApp: [REDACTED] [REDACTED]@[REDACTED]	Please see attached comments.	
Karen Miller Administrative Assistant The Seltzer Firm, PLLC [REDACTED] New York, NY [REDACTED]	Please see attached comments.	

Accrual of Unlawful Presence and F, J, and M Nonimmigrants



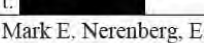
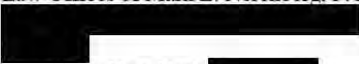

Stakeholder Comments Matrix

STAKEHOLDER/ ORGANIZATION	STAKEHOLDER COMMENTS	ORIGINATING OFFICE'S RESOLUTIONS
Tel: [REDACTED] Fax: [REDACTED] www.theseltzerfirm.com		
Brian K. Groves Director University of California, San Francisco International Students & Scholars Office William J. Rutter Center [REDACTED] San Francisco, CA [REDACTED] [REDACTED]	Please see attached comments.	
Pilar Ellis Manager, PDSO International Student Center Fullerton College [REDACTED] Fullerton, CA [REDACTED] (t) [REDACTED] [REDACTED]@[REDACTED]	Please see attached comments.	
Susan C. Ellison Director, Office of Visa and Immigration Services Dartmouth College [REDACTED] Hanover, NH [REDACTED] [REDACTED]@[REDACTED]	Please see attached comments.	
Mary E. Walsh, Esq. Iandoli Desai & Cronin P.C. [REDACTED] Boston, MA [REDACTED] Email: [REDACTED]@i[REDACTED] Web: www.iandoli.com	Please see attached comments.	

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Boston Office: [REDACTED] Worcester Office: [REDACTED]		
Deborah Altenburg Assistant Vice Chancellor for Federal Relations The State University of New York [REDACTED] Washington, D.C. [REDACTED] P [REDACTED]@ [REDACTED]	Please see <u>attached</u> comments.	
Joshua Davis Assistant Director Designated School Official [REDACTED] Office of International Student and Scholar Services Portland State University tel [REDACTED] j [REDACTED]@ [REDACTED]	<p>Dear Director Cissna,</p> <p>We are writing in response to the USCIS policy memorandum issued May 10, 2018 entitled “Accrual of Unlawful Presence and F, J, and M Nonimmigrants.” We are deeply concerned at the radical departure this memorandum presents from the 20 years of policy guidance that have preceded it. We advocate for the continuation of the current accrual of unlawful presence calculation for F-1 and J-1 students and scholars, which provides notice to the individual about a failure to maintain proper status. Students and scholars deserve formal notice before the accrual of unlawful presence begins, and only to be penalized with a re-entry bar if they knowingly remain in the U.S. for a significant period beyond that notice. The current policy is equitable and avoids disproportionately penalizing students, universities, and employers previously unaware of a visa violation, and affords an opportunity to resolve the problem.</p> <p>Our primary concerns with this policy memorandum are that it focuses exclusively on the student and scholar population in the United States, does not take into account the complexity of F-1 and J-1 status maintenance and actual experience of this population, and is unnecessarily punitive in nature. We are asking that the memo be withdrawn and that USCIS work with the student and scholar community to find a more reasonable solution if, in fact, this population is found to be regularly overstaying their lawfully allowed time in the United States.</p> <p>Under the unlawful presence policy of the past 20 years, lawfully admitted non-immigrants have been treated similarly with respect to their accrual of unlawful presence. For those admitted with a date-specific I-94, unlawful presence has begun accruing if the non-immigrant remains beyond the end of</p>	

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	<p>their authorized period of admission. For both those admitted with a date-specific I-94 and for "Duration of Status", unlawful presence would begin accruing on the day after an adverse decision is issued by a USCIS adjudicator or immigration judge, unless admitted with a date-specific I-94 that expired prior to the decision of the adjudicator or judge.</p> <p>The new policy does not establish a rational or legal basis for differentiating between F, M, and J non-immigrants and all other classes of non-immigrant, whether admitted with a date-specific I-94 or for Duration of Status. The stated goal of improving how USCIS implements unlawful presence grounds for inadmissibility would seem to be better served by consistent policies across all visa types. The stated goal of reducing the number of overstays would not be furthered by the policy change, as those individuals impacted by the policy are already in unlawful status and amenable to removal.</p> <p>The new memo changes the policy for F and M students and J exchange visitors and singles them out for penalties that are disproportionate to their offense. These populations are already tracked extensively during their time in the U.S. due to the use of SEVIS and the integration of that system with other DHS databases. As status violations are reported to DHS in real time, DHS could allocate resources to appropriately target those status violators who are amenable to removal as they are reported to DHS.</p> <p>A chief concern of ours with respect to the implementation of this policy is that the penalty can be applied retroactively, specifically the stipulation that an F, M, or J exchange visitor may begin accruing dates of unlawful presence as early as "the day after they no longer pursue the course of study or the authorized activity, or the day after they engage in an unauthorized activity." The calculation under this proposed memo will put students in a position to have possibly accrued several months of unlawful presence unknowingly, with no opportunity to go back in time to rectify a mistake they did not know they were making. It is further exacerbated by the fact that their accrual of unlawful presence may have been endorsed by a school's DSO, who acted in good faith in accordance with a school's interpretation of a shifting regulatory landscape.</p> <p>Furthermore, it is extremely rare that a status violation on the part of an international student or scholar truly represents a threat to the security of the United States. On the contrary: students and scholars who come to the United States to study, conduct research, and teach lend a crucial global lens to our campuses. In our combined 85 years of experience advising international student and scholar populations, we observe that a majority of the errors that they make leading to status violations are overwhelmingly due to innocent error, mis-advising on the part of a well-meaning academic advisor or</p>	

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	<p>faculty member who is not familiar with the immigration regulations, and situations that are simply beyond the control of the individual student or scholar.</p> <p>Putting students in a situation where they face 3-year, 10-year, or lifetime bars and are unable to return to the U.S. to complete their degrees will reflect extremely poorly on the U.S. education system in general, further impacting our already declining enrollments. Bear in mind that the majority of actions which lead to status violations are not malicious intent, but rather accidental missteps on the part of the student or scholar. It is inappropriate subject these exchange visitors to an academic environment with such a severe extent of scrutiny and penalization.</p> <p>Another concern with the policy proposal is that there is lacking a reliable mechanism for accurately tracking and recording days of unlawful presence, nor is there clarity on the subject of when a student in certain situations would begin accumulating days of unlawful presence. For instance, will a student who violates status by not completing 12 credits in a term begin accruing unlawful presence at the beginning of that term or not until the end? If in this example, if the count begins at the start of the term, how would the days of unlawful presence be tracked, or otherwise discovered?</p> <p>Without a clear determination of when the status violation occurred, there is undue burden on the part of USCIS adjudicators, greater likelihood of inconsistency, and the unfortunate outcome of the student or scholar having suddenly accrued several days of unlawful presence. A logical solution would be to count days of unlawful presence from the date a student's record is terminated, as advisors have reporting obligations with respect to status violations, and this would provide an unambiguous start date for tracking purposes.</p> <p>Furthermore, if a tracking method is implemented, it is crucial to consider who has access to this information, including students themselves. Students and scholars deserve to know if and when they begin accruing days of unlawful presence, and must be able to view this information at any time.</p> <p>However, even with a tracking system in place, reporting systems are often inaccurate and unreliable, as experienced with the recent launch of OPT Portal and the error that occurred recently with respect to reporting employment information. Students should not be penalized because the system did not accurately log information they reported.</p> <p>An additional risk is that other agencies, such as CBP, will interpret and enforce the proposed guidance in ways inconsistent with the intent of the memo. Any agency charged with evaluating student and</p>	

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	<p>scholar immigration status must have sufficient access to this information to make appropriate determinations about a student or scholar in a given situation. For example, individuals who have at some time in the past been international students who approach the U.S. borders as permanent residents, tourists and in other situations are frequently referred back to school for record "corrections" because their records have completed or been terminated for reasons like "change of status approved." These are not errors, but reflect accurate reporting on the part of DSOs. Inaccurate interpretations of status violations resulting in bars may not only impact individuals but will also reflect extremely poorly on the U.S. educational system.</p> <p>Guidance with such potentially severe consequences for F- and M- student populations and J-exchange visitors should be given more time for review and should not be implemented within a short three month period. Due to the ambiguity and severity of the guidance, more effort should be made to carefully review the rules and regulations currently in place that have been effective for many years. The current regulations allow students and scholars from around the world the opportunity to study and research, which enriches the academic environment and contributes to the US's legacy of promoting cultural exchange.</p> <p>We encourage you to withdraw the current policy proposal and take into consideration the recommendations outlined above. Thank you for your attention to this recommendation.</p> <p>Sincerely,</p>	
Linda Gentile  Pittsburgh, PA  t: 	Please see <u>attached</u> comments.	
Mark E. Nerenberg, Esq. Law Offices of Mark E. Nerenberg, P.C.  New York, New York Phone: 	<p>Dear Madam or Sir:</p> <p>I am writing to express my opposition to the Service's May 11, 2018 Memorandum, "Accrual of Unlawful Presence and F, J, and M Nonimmigrants." Adoption of the memo is premature.</p> <p>As a matter of policy, the Service should consider both the positive and negative impacts of policy change before implementing it. It is axiomatic that an understanding of policy impact should precede</p>	

STAKEHOLDER/ ORGANIZATION	STAKEHOLDER COMMENTS	ORIGINATING OFFICE'S RESOLUTIONS
Fax: [REDACTED] [REDACTED]@[REDACTED]	<p>policy change.</p> <p>But the memo nowhere acknowledges the good reason that F, M, and J nonimmigrants are admitted for "duration of status" rather than until a date certain: The law anticipates that these student visitors' missions will adjust during their stays in the United States. Countless lawful immigrants working in the United States today have benefited from the flexibility in the existing policy as they change schools, change programs and change degree levels. It is a feature, not a flaw, of the student system that in their careers many have slipped from then returned to valid status through the reliable operating mechanism of SEVIS. SEVIS assures they are present lawfully as they navigate the uniquely complicated rules and conditions of maintaining student status.</p> <p>How many students have become residents and citizens due to this grace? How much have they contributed to our nation? How many are now full professors, and parents of more citizens? By citing percentages who have remained in limbo, the memo reads only one side of the ledger.</p> <p>The memorandum has the laudable goal of reducing the "number of overstays" – by which I understand the number of individuals who flout the privilege of admission into the United States. In fact, the rule of law has benefited from SEVIS flexibility. F, M, and J nonimmigrants are different because they use this flexibility.</p> <p>A comma is not a period. In the same way, falling out of student status, then climbing back in, is not flouting the law. It is what has worked for decades. In sum, to weigh both the positive and negative effect of the memo's change, a review of both sides is necessary.</p> <p>Very truly yours,</p>	
Sarah M. Joughin Senior Associate Director Office of International Programs [REDACTED] University of Maine Orono, ME [REDACTED] Ph: [REDACTED] [REDACTED]@[REDACTED]	<p>Please see attached comments.</p>	

STAKEHOLDER/ ORGANIZATION	STAKEHOLDER COMMENTS	ORIGINATING OFFICE'S RESOLUTIONS
GALE LYNCH SENIOR DIRECTOR THE NEW SCHOOL GLOBAL ENGAGEMENT & INTERNATIONAL SUPPORT SERVICES [REDACTED] [REDACTED]@[REDACTED] T [REDACTED]	Please see <u>attached</u> comments.	
Tony Tambascia, PhD Executive Director Office of International Services University of Southern California [REDACTED]@[REDACTED]	Please see <u>attached</u> comments.	
Frank Calabrese, Esq. Associate Director, International Student and Scholar Services Penn Global University of Pennsylvania [REDACTED] Philadelphia, Pennsylvania [REDACTED] [REDACTED] (Phone) [REDACTED] (Fax) email: [REDACTED]@[REDACTED]	Please see <u>attached</u> comments.	
Betsy Lawrence mailto:[REDACTED]@[REDACTED]	Please see <u>attached</u> comments.	
Elizabeth A. James, PDSO Director Office of International Services, part of the Office of Global Engagement P: [REDACTED] [REDACTED]@[REDACTED]	Please see <u>attached</u> comments.	
Karen Cagley, MBA Director, International Student and Scholar	Dear Director Cissna,	

STAKEHOLDER/ ORGANIZATION	STAKEHOLDER COMMENTS	ORIGINATING OFFICE'S RESOLUTIONS
<p>Office Principal Designated School Official/Responsible Officer (SEVIS) [REDACTED] Lincoln, Nebraska [REDACTED] [REDACTED]@ [REDACTED]</p>	<p>The University of Nebraska – Lincoln writes in response to the U.S. Citizenship and Immigration Services (USCIS) policy memorandum of May 10, 2018, “Accrual of Unlawful Presence and F, J, and M Nonimmigrants.”</p> <p>These proposed changes are a radical change in USCIS’s interpretation and application of the regulations related to the accrual of unlawful presence by those in student (F nonimmigrant), exchange visitor (J nonimmigrant), or vocational student (M nonimmigrant) status and their dependents while in the United States. These proposed changes also create a system where F/J/M visa holders may be found to have violated their immigration status years after the violation supposedly occurred which may result in individuals being barred from entering the U.S. for three years, ten years, or permanently.</p> <p>There is no indication that USCIS has adequately coordinated implementation of this extreme policy shift with other government stakeholders such as the Department of State (including the Visa Office and the Bureau of Education and Cultural Affairs’ Exchange Visitor Program), and other divisions of DHS, including Immigration and Customs Enforcement (ICE), the Student and Exchange Visitor Program (SEVP), and Customs and Border Protection.</p> <p>This lack of coordination could cause inconsistency among immigration documents and electronic records and could lead to an adverse determination on status or benefit eligibility. Examples include the recent SEVP Portal release. The SEVP Portal was recently implemented and allows students on post-completion optional practical training (OPT) or STEM OPT to report changes to their personal and/or employment information, however, the system is having issues and has resulted in incomplete information or access to the portal is unavailable and/or confusion among students on what information to enter. This results in incomplete and inaccurate data being reported to SEVIS and based on the policy memo that indicates USCIS reliance on information in SEVIS to make decisions could judge student to have violated their status based on bad data.</p> <p>Even if the data in documents and electronic records is being interpreted correctly, immigration law is complicated, and both compliance and enforcement is a very technical matter that requires training and expertise. Because of this complexity, an alien might not even know he or she is “out of status” until informed by the government.</p> <p>In instances such as the recent announcement restricting 3rd party employment for students on STEM OPT, students were doing everything necessary to comply with the rules, only to find out that a new interpretation of a regulation could affect their ability to apply for a new visa or to change their</p>	

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	<p>immigration status in the future. Their actions were permissible when they started, but now, because of a change in the interpretation or the regulation, are not allowed and considered a violation of their status. This means that they would have since accrued unlawful presence, barring them from changing visa status or re-entering the U.S.</p> <p>Our recommendations would be to:</p> <ul style="list-style-type: none"> <input type="checkbox"/> Leave the current policy in place. Neither DHS nor legacy INS ever published regulations to implement this important area of law. If the agency wishes to implement such a drastic change to longstanding common interpretation of the law, it should be done through the notice and comment process. <input type="checkbox"/> Do not implement any policy change until implementation has been fully coordinated with the Department of State and other DHS units such as CBP and SEVP. <input type="checkbox"/> Exclude from the unlawful presence count any status violations that occurred under color of law, to avoid “gotcha” scenarios, where the student reasonably relied on the authorizations granted. For example, curricular practical training authorized in SEVIS that DHS later determines may have been improperly given, should not start the unlawful presence “clock” until DHS or an immigration judge makes a formal status determination. <input type="checkbox"/> Expand the sections describing examples where F, M, and J nonimmigrants “do not accrue unlawful presence in certain situations.” <p>In conclusion, this proposed change will likely result in confusion that could cause well-meaning international students and exchange visitors to be found to have accrued unlawful presence due to innocent mistakes or misunderstandings of changing regulations. Due to the strict bars that will be applied to these individuals due to these changes, these misunderstandings could have severe and lasting consequences.</p> <p>A vast majority of international students and exchange visitors want to maintain their immigration status in the U.S. and implementing this change in policy could result in international students and exchange visitors accruing unlawful presence despite their attempts to follow the rules.</p> <p>Thank you for the opportunity to comment.</p>	

STAKEHOLDER/ ORGANIZATION	STAKEHOLDER COMMENTS	ORIGINATING OFFICE'S RESOLUTIONS
	Sincerely,	
Kara Kauffman [REDACTED]@[REDACTED]	Please see <u>attached</u> comments.	
Andrea Popa [REDACTED]@[REDACTED]	<p>Dear Director Cissna:</p> <p>I am writing as a concerned professional with respect to the U.S. Citizenship and Immigration Services (USCIS) policy memorandum of May 10, 2018: PM-602-1060 "Accrual of Unlawful Presence and F, J, and M Nonimmigrants."</p> <p>I serve as an F-1 program Designated School Official (DSO) and J-1 program Responsible Office (RO) for a large research university in Boston with over 9,742 international students, primarily in F-1 and J-1 status. I also serve as F-1 program DSO to a small liberal arts college with 33 F-1 students in total.</p> <p>I have over 20 years of experience in international student and exchange visitor advising. I am active in training and advocacy roles with NAFSA: Association of International Educators, including past membership on the International Students and Scholar Regulatory Practice (ISS-RP) Student Sub-Committee, and current membership with NAFSA Region XI Government Regulatory Advisory Committee (GRAC).</p> <p>I recognize the important role that USCIS plays in ensuring that students and visitors to the United States are lawfully present.</p> <p>Summary of Policy Change</p> <p>Prior to the effective date of the memo on August 9, 2018, the longstanding interpretation has been that F, J and M nonimmigrants (including principals and dependents), may begin to accrue unlawful presence the day after a formal finding of status violation by a DHS official, immigration judge, or Board of Immigration Appeals (BIA).</p> <p>The new policy establishes that F, J, or M nonimmigrants who may fail to maintain nonimmigrant status on or after August 9, 2018, they may begin to accrue unlawful presence, including:</p> <ul style="list-style-type: none"> • The day after the F, J, or M nonimmigrant no longer pursues the course of study or the authorized activity, or the day after he or she engages in an unauthorized activity; 	

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	<p>• The day after completing the course of study or program (including any authorized practical training plus any authorized grace period, as outlined in 8 CFR 214.2); ...</p> <p>Current Law</p> <p>In considering this significant shift in interpretation, it is important to keep in mind that F, J, and M nonimmigrants already have a robust system for tracking and reporting status maintenance to DHS after admission to the U.S. through the Student and Exchange Visitor Information System (SEVIS). Program sponsors must already maintain real-time records for each student and meet tight reporting deadlines for any program change or infraction – including noting any authorized or unauthorized drops below full-time registration and proactively recommending or authorizing most employment.</p> <p>When a program sponsor determines that a student or exchange visitor appears to be in violation of their status, they are required to terminate the student or exchange visitor's SEVIS record, thus alerting DHS in real time that the student or exchange visitor is in legal jeopardy. This report already allows DHS to prioritize persons of highest concern for follow up and removal where appropriate.</p> <p>The prior memo on accrual of unlawful presence acknowledged a careful and appropriate balance between SEVIS as a trustworthy first indicator of status infraction, while also understanding the complexity of systems, as well as the need for further case review and a government finding prior to beginning the clock for the unlawful presence penalty.</p> <p>Holding off on starting the “clock” until after such time as a government determination had been made to gives the student or exchange visitor a clear finding of status violation when additional evaluation is required, as well as fair and clear warning that the unlawful presence accrual would begin if no action was taken to remedy the finding.</p> <p>Key Concerns</p> <p>My specific concerns with the new policy are as follows:</p> <ol style="list-style-type: none"> 1. Lack of transparency between status documents and systems that serve as status indicators: 	

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	<p>For many nonimmigrants, the date-certain I-94 or document expiration date, give a clear “bright line” indication at the time of U.S. admission regarding the length of permitted stay. Most F, J and M nonimmigrants are admitted for “D/S” (“duration of status”) which denotes a careful balance of maintaining unexpired documents, keeping an active and valid immigration record, and following detailed guidelines related to academic activities, employment and reporting deadlines.</p> <p>There are several documents and systems that serve as status indicators for F, J, and M nonimmigrants. These may include: (1) a Form I-20 or DS-2019, (2) an electronic immigration record in the Student and Exchange Visitor Information System (SEVIS), (3) a passport stamp showing entry to the U.S. for duration of status or until a date certain, and (4) an electronic I-94 record.</p> <p>Given the complexity of system interfaces and inconsistency between documents that are used as immigration status indicators, it may not always be immediately clear to a nonimmigrant student or exchange visitor in F, J, or M status that their immigration status is in jeopardy at the time that a technical violation of status occurs.</p> <p>For example, a student or exchange visitor may not be immediately aware:</p> <ul style="list-style-type: none"> • If their SEVIS record is terminated – whether by batch reporting or manually by a school official, whether in accordance with regulations and guidance or in error. • If their I-94 record is not extended to D/S following a timely response to an I-515A. • If USCIS approves incorrect dates on an Employment Authorization Document for Optional Practical Training, requiring a lengthy correction process to the EAD and/or SEVIS record. • If the USCIS-SEVIS CLAIMS interface inadvertently completes a SEVIS record early when an H-1B petition is approved for a future start date. <p>2. Accrual “clock” would begin without a government finding.</p>	

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	<p>Apart from scenarios where a student may not be immediately aware of a status infraction, the new memo also does not account for situations where a government agency may, after review and evaluation, make a determination that a past action falls short of a regulatory requirement.</p> <p>For instance, SEVP has struggled for years to develop systems to accurately capture dates and data on OPT employment. While the recently launched SEVP Portal now allows greater functionality and transparency in this area, there is still a high degree of subjective review that might come in to evaluating the appropriateness or major-relatedness of employment.</p> <p>It is extremely worrisome that a student may now face the risk of retroactive extreme bars if employment to which they entered in good faith may later come under extreme or prejudicial review.</p> <p>For instance:</p> <ul style="list-style-type: none"> • If the student reports employment during Optional Practical Training job that is later determined not to be directly related to their major field of study. • If a student continues to work in good faith on the basis of a timely-filed pending application for STEM OPT extension, but the application is later denied by USCIS on the basis of a change in interpretation related to employer-employee relationships. • If a student participated in a curricular activity that is later determined after evaluation to require CPT authorization. <p>Because of this complexity of evaluating and determining lawful status in these and similar cases, a student or exchange visitor might not even know they are "out of status" until a formal evaluation is made or communicated to them by a government agency.</p> <p>3. Retroactive penalty for students who seek reinstatement or status correction:</p> <p>Under the new memo, students who choose to utilize the F-1 reinstatement process as an avenue for legal appeal risk a lengthy adjudication process, the current reality of extreme adjudications, and the significant penalty of a 3-year or 10-year bar if their case is denied.</p> <p>Given that applications for reinstatement are currently taking 10-13 months for adjudication, this</p>	

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	<p>avenue has become nearly obsolete. The small handful of students who I advise who have opted to apply for reinstatement in recent years have been unable to travel abroad due to war, travel bans, or due to financial, health or other personal concerns.</p> <p>Under the new policy, virtually all students who apply for reinstatement would risk the possibility of a 3-year or 10-year bar from the U.S.</p> <p>A student who is denied reinstatement and then then barred from return is then unable to rectify their legal status by travel and loses the ability to complete their U.S. degree.</p> <p>I believe this extreme policy change would render reinstatement essentially unusable as a legal recourse.</p> <p>SUMMARY RECOMMENDATION</p> <p>As stated by NAFSA: Association of International Educators in their comment letter:</p> <p>This proposal is yet another policy which makes the United States less attractive to talented international students, scholars, and exchange visitors and undoubtedly will encourage them to look elsewhere to do their groundbreaking research and build diplomatic ties. Foreign students, scholars, and exchange visitors are here to learn, and they make America safer by becoming the nation's best ambassadors and allies. By treating them all as criminals for minor or technical violations, we will be making America less safe and a less desirable place to study.</p> <p>I join NAFSA in strongly recommending that USCIS continue its current policy of not begin the unlawful presence "clock" until after a notice of finding is made by a government agency. Unlawful presence should only be triggered when there is clear notice of remaining beyond an expiration date of authorized stay in the United States and not when there is a contestable allegation of violation of status.</p> <p>I am grateful for the opportunity to submit comments on this proposed policy change, and hope that my recommendations may help to rectify the inordinate penalty that might be imposed under the new policy.</p> <p>Respectfully,</p>	

STAKEHOLDER/ ORGANIZATION	STAKEHOLDER COMMENTS	ORIGINATING OFFICE'S RESOLUTIONS
Tim Leshan Vice President for Government Relations Northeastern University [REDACTED]	Please see <u>attached</u> comments.	
Allison Terry [REDACTED]@[REDACTED]	Please see <u>attached</u> comments.	
Todd Schulte [REDACTED] [REDACTED]@[REDACTED]	Please see <u>attached</u> comments.	
PAUL T. SHANE, Immigration Attorney, Independent Law Offices, [REDACTED] [REDACTED] Newton MA [REDACTED] USA TEL: [REDACTED] FAX: [REDACTED] EMAIL: [REDACTED]@[REDACTED]	Please see <u>attached</u> comments.	
Courtney Tudi Director, National Immigration Programs P (720) 549-4844 E [REDACTED]@wr.org	Please see <u>attached</u> comments.	
Shannon Lederer Director of Immigration Policy AFL-CIO [REDACTED] [REDACTED]@[REDACTED]	Please see <u>attached</u> comments.	
United Faculty and Academic Staff [REDACTED] Madison, WI [REDACTED] [REDACTED]@[REDACTED]	Dear Director Cissna: As faculty and staff members at the University of Wisconsin-Madison who are members of United Faculty and Academic Staff (American Federation of Teachers local #223), we are writing to urge that you not implement the proposed policy changes for nonimmigrant international student and scholar	

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	<p>visas. International students and scholars contribute greatly to the research, teaching, service and general scholarship missions of our University. Opportunities to collaborate and exchange ideas not only benefit the international students and scholars, but also enhance the experience for students, faculty and staff from the United States, especially crucial in the present world of increasing global interactions.</p> <p>We have serious concerns about the proposed change to international student and scholar visa policy related to the unlawful presence determination. We are concerned that the proposed change erodes due process and places an undue burden on those with visas. Further, the proposed change threatens to chill the exercise of civil and workplace rights. Additionally, the proposed change will put well-intentioned students and workers at risk of severe penalties for accidental or unwitting violations of status.</p> <p>We strongly oppose the proposed changes to policy regarding international student and scholar visas and urge USCIS to maintain a fair process of notification and review before unlawful status can begin to accrue. We encourage policies that welcome and facilitate the inclusion of international students and scholars on our campuses.</p> <p>Sincerely, UFAS Steering Committee and members</p>	
Przemyslaw Jan Bloch [REDACTED]@[REDACTED]	Please see attached comments.	
Kathy M. Foley [REDACTED]@[REDACTED]	Please see attached comments.	
Jenny T. Dao [REDACTED]@[REDACTED]	Please see attached comments.	
Jeanne E. Kellev [REDACTED] Boston, MA T [REDACTED] [REDACTED]@[REDACTED]	Please see attached comments.	
Justin Storch mailto:[REDACTED]@[REDACTED]	Please see attached comments.	



May 24, 2018

Mr. L. Francis Cissna
Director
U. S. Citizenship & Immigration Services
Department of Homeland Security
20 Massachusetts Avenue, NW
Washington, DC 20529

Dear Director Cissna:

NAFSA: Association of International Educators writes in response to the U.S. Citizenship and Immigration Services (USCIS) policy memorandum of May 10, 2018, "Accrual of Unlawful Presence and F, J, and M Nonimmigrants." The memo is an abrupt, radical departure from more than 20 years of policy guidance. NAFSA requests that USCIS withdraw the memo and implement the recommendations provided below.

The proposed change is operationally complex and may lead to wrongly identifying a large number of foreign students and exchange visitors as failing to maintain lawful status, thus unfairly subjecting them to the 3-year, 10-year, or permanent bars to re-entry to the United States. Like American students, international students should be allowed to complete their studies at their chosen institution, without the stress or fear of being deported based on an oversight of which they may not be aware.

This memo eliminates the long-held distinction between violating immigration status and being unlawfully present in the United States. The concept of "unlawful presence" with various "clocks," "tolling" provisions, and "bars" has to this point been the purview of immigration law specialists and law school classes. Immigration policy is incredibly complex with dire consequences for violation. Foreign students, scholars, and exchange visitors are not immigration attorneys or policy professionals and it is unfair to treat them as such. Unlawful presence should only trigger when there is clear notice of remaining beyond an expiration date of authorized stay in the United States and not when there is a contestable allegation of violation of status.

This proposal is yet another policy which makes the United States less attractive to talented international students, scholars, and exchange visitors and undoubtedly will encourage them to look elsewhere to do their groundbreaking research and build diplomatic ties. Foreign students, scholars, and exchange visitors are here to learn, and they make America safer by becoming the nation's best ambassadors and allies. By treating them all as criminals for minor or technical violations, we will be making America less safe and a less desirable place to study. This is contrary to our nation's values as a welcoming nation of immigrants.

Further, USCIS may achieve the goal of reducing the number of nonimmigrants who violate immigration status or stay beyond the legally allowable period through the implementation of various policies within the sub-agencies of the Department of Homeland Security (DHS) and in collaboration with other federal agencies. These policy changes must be implemented before announcing a policy change that will apply a disproportionate punishment of the 3-year, 10-year, and permanent bars of admissibility to international students and exchange visitors and their spouses and children.

Background

The current policy has held up for more than twenty years because it provides bright-line dates established in government systems, which give adequate notice to students and exchange visitors and their schools and exchange programs.

The expiration date on a Form I-94 is one such clearly established date. If an individual stays beyond that date, he or she begins to accumulate days of unlawful presence. Many status violations do not present such a bright line, particularly because there is overlap between different types of “status.” For example,

- Visa status (the validity period of the nonimmigrant visa in your passport)
- SEVIS status (the draft, initial, active, completed, deactivated, or terminated status of a nonimmigrant’s electronic record in the Student and Exchange Visitor Information System database)
- Nonimmigrant status (abiding by the duration and other conditions of the nonimmigrant category in which an alien is admitted to the United States by DHS)

DHS now proposes to directly equate a violation of nonimmigrant status accorded under INA 214, with the start of counting days of unlawful presence under INA 212(a)(9)(B).

While an alien who violates his or her nonimmigrant status is certainly removable, the policy in place for the last 20 years that distinguishes between status violations and unlawful presence makes sense for purposes of applying INA 212(a)(9)(B), from both legal and public policy viewpoints. A clear government determination, whether it is the expiration date on a nonimmigrant’s Form I-94, or a formal finding of a status violation made in the course of a DHS benefits determination or by an immigration judge, serves as a fair and clear warning to an alien that the clock is ticking, and he or she must take action to leave the United States or otherwise cure the status deficiency. An alien who persists after such fair notice, must face the possibility of not being able to return to the United States for either 3 or 10 years.

Complexity

INA 214(a)(1) provides that, “admission to the United States of any alien as a nonimmigrant shall be for such time and under such conditions as the Attorney General [DHS Secretary] may by regulations prescribe...”

Nonimmigrant status is a legal condition, not a physical thing. It is also dynamic, not static, which means that a person's nonimmigrant status must be acquired and maintained, and can be changed, or lost, and in some circumstances, reinstated. In many respects,

nonimmigrant status is a relationship with the U.S. immigration system, with actions, events, and data in the "real" world contributing to the acquisition and maintenance, change, loss, or restoration, of the nonimmigrant relationship.

These actions, events, and data are often recorded and presented in relation to one another in the form of physical and electronic documents and records. Documents and electronic records only point to immigration status, though; they do not stand in the place of it. In this sense, the various documents associated with a nonimmigrant status, and the data contained in databases associated with that status, should be viewed as indicators of nonimmigrant status. If all documents and electronic records are consistent, their reliability as indicators of immigration status is high. However, these documents and records reflect only a snapshot in time, they reflect only some, not all, actions, events, and data, and they are subject to both machine and human error.

A failure to account for inconsistency among immigration documents, electronic records, and actions and events in the real world could lead to an adverse determination on status or benefit eligibility. Whether the data in documents and electronic records is being interpreted correctly, taking into account all applicable law and policy, is also a primary concern.

Immigration law is complicated, and both compliance and enforcement is a very technical matter that requires training and expertise. Because of this complexity, an alien might not even know he or she is "out of status" until informed by the government.

Fairness

Because the INA 212(a)(9)(B) penalties are so severe, we must also weigh the fairness of the policies enforcing that law. Long USCIS adjudication times, for example, may lead to someone becoming subject to the unlawful presence penalties in any case that is ultimately denied. For example, consider a student who registers for fewer classes than she should have one semester, which leads her school to terminate her SEVIS record. In good faith, the student registers for a full course of study the next semester, and applies in good faith to USCIS to reinstate her student status. It is not uncommon for a USCIS Service Center to take six months or longer to adjudicate an application for reinstatement to student status.

Under current USCIS policy, if USCIS ultimately denies her reinstatement the student would start counting unlawful presence as of the date of the denial, which gives sufficient time to either make arrangements to leave the country, or possibly to ask USCIS to reconsider its decision. In the proposed policy, virtually all students whose reinstatement applications are denied would find themselves subject to at least the 3-year bar, merely because USCIS takes so long to adjudicate applications for reinstatement.

In addition, a student or exchange visitor might not even know that he or she was in violation of status until DHS makes a formal determination of that. If the unlawful presence "clock" is seen to start at some distant time in the past in such cases, any window for departing the country will have passed.

Interagency Coordination

There is no indication that USCIS has adequately coordinated implementation of this extreme policy shift with other government stakeholders, including the Department of State (including the Visa Office and the Bureau of Education and Cultural Affairs' Exchange Visitor Program), and other divisions of DHS, such as Immigration and Customs Enforcement (ICE), the Student and Exchange Visitor Program (SEVP), and Customs and Border Protection.

Recommendations

In lieu of implementing the policy described in the memo, NAFSA recommends the following.

- Leave in place the current policy, which has served for over 20 years. Neither DHS nor legacy INS ever published regulations to implement this important area of law. If the agency wishes to implement such a drastic change to longstanding common interpretation of the law, it must be done through the notice and comment process.
- Do not implement any policy change until implementation has been fully coordinated with the Department of State and other DHS units such as CBP and SEVP.
- Exclude from the unlawful presence count any status violations that occurred under color of law, to avoid "gotcha" scenarios, where the student reasonably relied on the authorizations granted. For example, curricular practical training authorized in SEVIS that DHS later determines may have been improperly given, should not start the unlawful presence "clock" until DHS or an immigration judge makes a formal status determination.
- Apply the change of status/extension of stay tolling rules to reinstatement applications.
- Expand the sections describing examples where F, M, and J nonimmigrants "do not accrue unlawful presence in certain situations." [draft Adjudicator's Field Manual 40.9.2(b)(1)(E)(iii)].

Thank you for the opportunity to comment.

Sincerely,



Esther D. Brimmer, Executive Director and CEO



June 8, 2018

The Honorable L. Francis Cissna
Director
U.S. Citizenship and Immigration Services
U.S. Department of Homeland Security
20 Massachusetts Avenue, NW
Washington, D.C. 20529

Dear Director Cissna:

The Alliance for International Exchange, an association of 90 nongovernmental organizations comprising the international educational and cultural exchange community in the United States, writes to comment on the U.S. Citizenship and Immigration Services (USCIS) policy memorandum dated May 10, 2018 concerning the "Accrual of Unlawful Presence and F, J, and M Nonimmigrants." While we support the overall goals of upholding the rule of law and ensuring our national security, we have some concerns regarding the new policy guidance.

Nonimmigrant foreign students and exchange visitors are usually admitted entry to the United States for duration of status rather than for date certain visas. While foreign students and exchange visitors are advised of U.S. laws and program compliance requirements, including the requirement not to overstay visas, maintaining lawful status may be inadvertently or unknowingly violated in minor, technical infractions. For example, minor deviations from the scope of exchange visitor activities that are raised in a U.S. Department of State site visit are subsequently remedied by the host and participant. Under the new policy guidance, that scenario could start the accrual of unlawful presence due to the inadvertent violation of status, even if it is something that is remedied under existing protocols outlined in 22 CFR 62.45. We encourage the agency to factor in these protocols, along with the ability of the Student and Exchange Visitor Program (SEVP) or the U.S. Department of State to approve reinstatements of program to valid status, into this policy guidance.

Under the new policy guidance, foreign students and exchange visitors begin accruing unlawful presence due to failure to maintain status on the day after no longer pursuing "the course of study or the authorized activity, or the day after he or she engages in an unauthorized activity." Unauthorized activity could be interpreted so that minor issues, such as not securing a travel validation before international travel, could have significant long-term implications.

While we support improving technologies and systems used to monitor compliance with programs, the systems are subject to automated and clerical errors. These factors should be taken into account in determining violation of status leading to accrual of unlawful presence. We encourage USCIS to continue working with the U.S. Department of State and other federal agencies to improve the accuracy of data collected by these systems to ensure that foreign students and exchange visitors are not negatively impacted by inaccurate information.

Under existing exchange program guidelines, there is a grace period for participants to depart the country to allow for potential travel disruptions. We support maintaining a grace period, consistent with guidance from U.S. Department of State and other departments and agencies, to allow for



adequate departure plans before unlawful presence begins accruing. We thank the agency for maintaining this grace period in the draft policy guidance and request that any future versions continue to do so.

Exchange programs are an important part of our public diplomacy efforts furthering U.S. national security. We support maintaining the integrity of the programs and ensuring its continued robustness through fair enforcement of the rule of law.

Sincerely,

A handwritten signature in black ink, appearing to read "Ilir Zherka", with a stylized flourish at the end.

Ilir Zherka
Executive Director



Mr. L. Francis Cissna
Director
United States Citizenship and Immigration Service
Department of Homeland Security
20 Massachusetts Avenue, NW
Washington, DC 20529

Submitted via publicengagementfeedback@uscis.dhs.gov

June 7, 2018

**Re: Accrual of Unlawful Presence and F, J, and M Nonimmigrants (PM-602-1060),
Dated May 10, 2018**

Dear Director Cissna:

The University of St. Thomas submits this comment in response to the above referenced policy memorandum. The May 10, 2018 Policy Memorandum, PM-602-1060 *on Accrual of Unlawful Presence and F, J, and M non-immigrants* (May 2018 Memorandum) is an extreme departure from past practice which eliminates the historic distinction between violating immigration status and being unlawfully present in the United States, but for only the F, J, and M non-immigrants. Moreover, USCIS's proposed retroactive adjudication of unlawful presence for F, J, and M non-immigrants is vague, unfair, violates our understanding of due process, and allows USCIS to arbitrarily second-guess decisions delegated to Designated School Officials (DSOs) by regulation.

The University of St. Thomas does not intend to minimize the seriousness of the situation for Fs, Js, or Ms who have their record in SEVIS terminated for failure to enroll, or who remain after the expiration of their 60 day grace period following graduation, but the university believes there are better ways to address those violations. With the low percentage of F, J, and Ms overstay violations reported by USCIS, the University of St. Thomas questions whether it is worth upending the existing system that has generally worked well for many years and replacing it with a new, vague, ill-defined and operationally complex policy that imposes a severe penalty for both major and minor infractions and creates an opaque enforcement system. The University of St. Thomas believes that the new policy in the May 2018 Memorandum will be impractical for USCIS to enforce and will likely lead to unpredictable and unreasonable outcomes for F, J, and M non-immigrants.

Instead, the University of St. Thomas recommends that the United States Citizenship and Immigration Services (USCIS) reconsider or withdraw the proposed changes to accrual of unlawful presence in the May 2018 Memorandum for the reasons stated below, and instead continue to apply the May 6, 2009 Policy Memorandum on the *Consolidation of*

Guidance Concerning Unlawful Presence for Purposes of Sections 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I) (May 2009 Memorandum).

About the University of St. Thomas:

The University of St. Thomas is a private non-profit Catholic university based in St. Paul, Minnesota with additional campuses in Minneapolis, Minnesota and in Rome, Italy. Founded in 1885, the University of St. Thomas is the largest private university in Minnesota, and nationally known for academic excellence. The University of St. Thomas prepares its students for the complexities of the contemporary world. Our university is rooted in the Catholic intellectual tradition, students are taught to think critically, act wisely and work for the common good. The University of St. Thomas's approximately 10,000 students pursue degrees in a wide range of liberal arts, professional and graduate programs.

Within that student body, The University of St. Thomas has more than 500 F-1 and J-1 students and international scholars from more than 70 different countries. The diversity that these F-1s and J-1s bring adds an important dimension to the college experience. The University of St. Thomas' Office of International Students and Scholars (OISS) provides a wide variety of services for the F-1 and J-1 students that attend the University, including handling the SEVIS issues for our F and J non-immigrants. OISS also co-leads an international student retention group to help minimize barriers and enhance success.

University of St. Thomas' OISS has received praise from the Department of Homeland Security Student and Exchange Visitor Program (SEVP) as a model institution for compliance with immigration regulations. DHS SEVP Liaison brought SEVP central personnel to meet with University of St. Thomas OISS as a sample model school.

The May 2018 Memorandum Is Too Vague:

The May 2018 Memorandum on unlawful presence as drafted is too vague, making it difficult to advise students on the best of course of action to avoid incurring unlawful presence. On page 4, the May 2018 Memorandum states that on or after August 9, 2018 the F, J, or M non immigrant (and dependents) will begin accruing unlawful presence "the day after the F, J, or M nonimmigrant no longer pursues the course of study or the authorized activity, or the day after he or she engages in an unauthorized activity." For reasons that we explain below, this entire bullet point does not inform students or advisors of what activities trigger unlawful presence or when an activity would trigger unlawful presence.

It is unclear what “no longer pursues course of study” means in light of different institutional rules about financial holds on registration, late registration, and drop/add. With regard to “the day after the F, J, or M nonimmigrant no longer pursues the course of study”, USCIS has not explained how it will know “the day” that happened and the objective measure it would use to determine when a student no longer pursues a course of study. If USCIS had wanted a clear and simple rule, USCIS could have stated that unlawful presence begins when the Designated School Official terminates the F, J, or M non-immigrant’s record in SEVIS for failure to register or maintain a full course of study without approval of the Designated School Official. USCIS in the May 2018 Memorandum does not adopt such a simple rule unfortunately, and it does not explicitly use the definitions in 8 CFR § 214.2(f)(6) of “full course of study.”

It is not clear whether an F-1 student has failed to pursue a course of study when the student would like to enroll in classes, but the student cannot register for classes due to a financial hold. Institutions have different rules and grace periods for lifting the financial hold and enabling enrollment even after the beginning of a semester and the start of classes. The May 2018 Memorandum is unclear as to whether unlawful presence will begin in the circumstances of a financial hold, and if so, if it will begin at the end of the grace period set by the college or university, or at some other time. The May 2018 Memorandum also does not make clear, if the USCIS adjudicator will apply the institution’s rules applicable at the time of the financial hold, or at the time of adjudication, or how USCIS will address a situation where the institution’s rules applicable at the time of financial hold are no longer available or applicable.

In addition, there are similar concerns about the wide variety of rules at different institutions of higher education about late registration, and dropping and adding classes. USCIS in the May 2018 Memorandum does not clarify how drop/add rules or late registration rules might apply in the pursuit of a course of study. The May 2018 Memorandum is unclear as to whether unlawful presence will be triggered if a student registers late, but within an institution’s grace period, or if a student drops a class, thereby falling temporarily below full-time, but later adds a new class (either within the institution’s grace period or perhaps not).

Similarly, USCIS in the May 2018 Memorandum provides no clear guidance as to what USCIS means by “engaged in an unauthorized activity.” It is unclear exactly what activities USCIS means to include, in addition to the requirement of pursuing a course of study specifically noted in the May 2018 Memorandum. Students are required to do a lot of different things under 8 CFR § 214.2(f) such as report change of address, seek extensions of Curricular Practical Training (CPT), report changes in OPT employers, inform the DSO of changes of major, work on OPT in a position related to their degree, work on-campus part-

time during class and full-time during breaks, obey the terms of their CPT as to part-time or full-time, report to the institution at the beginning of the semester, and not work without authorization, to name a few. It is not clear whether USCIS means in the May 2018 Memorandum to include a failure to adhere to one or more of these rules, or all of them. Also, some of these norms are not well-defined, such as what constitutes part-time, when a change of major must be reported, and other institutional rules. USCIS adds to the confusion by not clearly stating that the bullet pointed activities on page 10 and 11 are permitted in-status activities for students within the rules of 8 CFR § 214.2(f). Instead USCIS calls this a list of activities where students “generally do not accrue unlawful presence,” which is not the same thing, and invites USCIS adjudicators to question whether a student who engages in a specifically authorized in-status activity has somehow violated status by doing so.

The May 2018 Memorandum Process Proposed by USCIS for Determining Unlawful Presence Retroactively Is Unfair and Appears to Second Guess the Authority Delegated to Designated School Officials:

The May 2018 Memorandum proposes to have unlawful presence determined by USCIS officers when F, J, or M non-immigrants apply for benefits or a change of status. This means that USCIS will be looking backward months, or even years, over the course of a student’s career to try to find a blemish on their status. If a violation of status is found, the USCIS adjudicator must determine the date unlawful presence began and inform the F, J, or M non-immigrant that they may be unlawfully present past the critical 180 day or 365 day periods. Because there is significant grey area around some of these rules, the student may not even be aware that USCIS would consider the blemish a violation of status.

Moreover, the F regulations and the regulations around SEVIS delegate significant authority in 8 CFR § 214.3 and 8 CFR § 214.4 to Designated School Officials (DSO) to address some of these issues and determine whether the issues are serious enough to warrant termination of a SEVIS record. USCIS with this May 2018 Memorandum appears to be intruding upon and second guessing the authority of the DSO to address these issues and resolve them.

The May 2018 Memorandum Imposes Too Great A Penalty for Potentially Minor Violations:

International students, like U.S. students, are in college to get a degree and mature. Part of becoming a mature adult sometimes involves making minor mistakes and learning from them. International students are experiencing the world in a different country far from their parents and they sometimes make poor choices. The University of St. Thomas’

international advisers and Designated School Officials provide our international students with significant assistance to help them comply with F and J rules, but even with reminders, some students make mistakes. A mistake does not make someone a bad person and should not define their lives, or their academic careers. Most international students, once they realize a mistake is made, take action to correct the mistake and then do not make the same mistake in the future. The May 2018 Memorandum demands that young adults be mistake-free, which is unreasonable. While expecting students to continue to pursue a full-time course of study might be reasonable, it is not reasonable to throw away a whole academic career, because someone made a minor mistake. In fact, the whole process of reinstatement exists because USCIS and SEVP have recognized that mistakes do get made and that in many cases a mistake should not end an academic career.

The May 2018 Memorandum Does Not Encourage Reporting Issues and Applying for Re-instatement:

The May 2018 Memorandum should encourage students to report issues and apply for reinstatement and this Memorandum does not. USCIS could solve this problem by simply not starting unlawful presence until after a decision was made on reinstatement. Under the May 2018 Memorandum, reinstatement will trigger unlawful presence on the day of the reported violation in the reinstatement request. According to footnote 29 of the May 2018 Memorandum, unlawful presence continues while the request pends without tolling, and only if it is approved, does the unlawful presence disappear. The current trend on reinstatement requests is that they increasingly take longer and longer to be processed, with some of them taking 6 months or more. Accordingly, students may avoid reporting and seeking reinstatement, because the student may not want to take the risk of becoming subject to an unlawful presence 3-year or 10 year bar upon departure from the U.S., while waiting for the reinstatement request to be adjudicated.

University of St. Thomas' Policy Recommendations for USCIS:

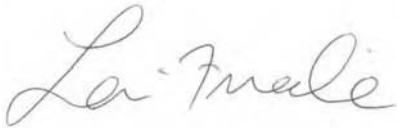
- USCIS should withdraw the May 18, 2018 Memorandum and continue to apply the May 2009 Memorandum.
- USCIS should adopt a bright-line rule that provides advanced notice to the F, J, and M non-immigrant consistent with due process and other regulations for when unlawful presence begins. For example, by withdrawing the vague May 2018 Memorandum, USCIS could instead revise the May 6, 2009 Policy Memorandum so that unlawful presence for F, J, and M nonimmigrants accrues when the Designated School Official (DSO) or Responsible Officers (RO) or Alternate Responsible Officers (ARO) terminates the F, J, or M non-immigrant's record in SEVIS for failure to show or failure to enroll in course of study. However, unlawful presence would be tolled if a reinstatement was requested consistent with other guidance in the May 2009 Memorandum. This ground would be in addition to the

other instances noted in the May 2009 Memorandum when unlawful presence begins to accrue for F, J, and M non-immigrants.

- USCIS should adopt the Policy Recommendations in the NAFSA Letter, dated May 24, 2018 to USCIS Director Cissna.

We sincerely appreciate the opportunity to openly and candidly address our concerns.

Respectfully Submitted,

A handwritten signature in cursive script, appearing to read "Lori Friedman".

Lori Friedman, PDSO
Director, Office of International Students & Scholars
University of St. Thomas



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Mr. L. Francis Cissna
Director
U. S. Citizenship & Immigration Services
Department of Homeland Security
20 Massachusetts Avenue,
NW Washington, DC 20529

Dear Director Cissna:

I write in response to the U.S. Citizenship and Immigration Services (USCIS) policy memorandum of May 10, 2018, "Accrual of Unlawful Presence and F, J, and M Nonimmigrants." The memo is a departure from more than 20 years of policy guidance. We respectfully request that this policy not be implemented and instead further study the issue and coordinate a better strategy by coordinating with other agencies.

The proposed change is operationally complex and may lead to wrongly identifying some foreign students and exchange visitors as failing to maintain lawful status, thus unfairly subjecting them to the 3-year, 10-year, or permanent bars to re-entry to the United States. Given the huge financial investments made by international students they should be allowed to complete their studies at their chosen institution, without the stress or fear of being deported based on an oversight of which they may not be aware. This memo eliminates the long-held distinction between violating immigration status and being unlawfully present in the United States. The concept of "unlawful presence" with various "clocks," "tolling" provisions, and "bars" has to this point been the purview of immigration law specialists.

USCIS may achieve the goal of reducing the number of nonimmigrants who violate immigration status or stay beyond the legally allowable period through the implementation of various policies within the sub-agencies of the Department of Homeland Security (DHS) and in collaboration with other federal agencies. These policy changes must be implemented before announcing a policy change that will apply a disproportionate punishment of the 3-year, 10-year, and permanent bars of admissibility to international students and exchange visitors and their spouses.

A failure to account for inconsistency among immigration documents, electronic records, and actions and events in the real world could lead to an adverse determination on status or benefit eligibility. Whether the data in documents and electronic records is being interpreted correctly, taking into account all applicable law and policy, is also a primary concern. Immigration law is complicated, and both compliance and enforcement is a very technical matter that requires training and expertise. Because of this complexity, an alien might not even know he or she is "out of status" until informed by the government.

Because the INA 212(a)(9)(B) penalties are so severe, we must also weigh the fairness of the policies enforcing that law. Long USCIS adjudication times, for example, may lead to someone becoming subject to the unlawful presence penalties in any case that is ultimately denied. In the proposed policy, virtually all students who submit reinstatement applications and who are denied would find themselves subject to at least the 3-year bar, merely because USCIS takes so long to adjudicate applications for reinstatement. For example, a student who simply forgets to extend their I-20 and misses the extension deadline by more than 15 days (PDSO extension window) and has only 1 semester left. These students can either travel and lose OPT or file for reinstatement. These reinstatements take up to 6 months or more. The risk for reinstatement would be so great that the student would have to make a terrible choice- to disrupt studies and travel at a critical completion period and lose post-completion training benefits OR apply for a reinstatement that might result in their facing 3-10 year bars if denied. In addition, a student or exchange visitor might not even know that he or she was in violation of status until DHS makes a formal determination of that. If the unlawful presence “clock” is seen to start at some distant time in the past in such cases, any window for departing the country will have passed.

In addition, there is no indication that USCIS has adequately coordinated implementation of this extreme policy shift with other government stakeholders, including the Department of State (including the Visa Office and the Bureau of Education and Cultural Affairs’ Exchange Visitor Program), and other divisions of DHS, such as Immigration and Customs Enforcement (ICE), the Student and Exchange Visitor Program (SEVP), and Customs and Border Protection.

Recommendations in lieu of implementing the policy described in the memo:

- Leave in place the current policy, which has served for over 20 years. Neither DHS nor legacy INS ever published regulations to implement this important area of law. If the agency wishes to implement such a drastic change to longstanding common interpretation of the law, it must be done through the notice and comment process.
- Do not implement any policy change until implementation has been fully coordinated with the Department of State and other DHS units such as CBP and SEVP.
- Exclude from the unlawful presence count any status violations that occurred under color of law.
- Apply the change of status/extension of stay tolling rules to reinstatement applications.
- Expand the sections describing examples where F, M, and J nonimmigrants “do not accrue unlawful presence in certain situations.”

Sincerely,



Ivor M. Emmanuel
Director

UNIVERSITY OF MINNESOTA

June 5, 2018

Re: Accrual of Unlawful Presence and F, J, and M Nonimmigrants

Dear USCIS,

I am writing in regard to "Policy Memoranda: Accrual of Unlawful Presence and F, J, and M Nonimmigrants (PM-602-1060)." This proposal is a drastic change from the current interpretation and application of the regulations.

I work at the University of Minnesota, where we have a substantial number of international students, researchers, staff and faculty on our campuses who bring a wide range of experiences and perspectives to our classrooms and contribute to important discoveries and innovations in our research labs.

As a PDSO/ARO I was alarmed to read the proposed changes with regard to accrual of unlawful presence. I advise international students, scholars and their dependents on how to maintain their visa status. Maintaining legal status is something most of our population try to do, but for students, it means they need to be aware of visa regulations while also balancing the demands all students experience along with the University's requirements and sometimes this can be very confusing.

I am concerned about how I and my staff will assist F/J visa holders in understanding these new policies without unintentionally engaging in the unauthorized practice of law. The proposed changes are especially problematic because they would upend visa regulations that have been in place for over 20 years. What is so disturbing about this policy is that USCIS will in most instances not provide any advance warning or issue any specific adjudication to inform an F or J nonimmigrant that he/she has begun to accrue unlawful presence. Rather, the determination as to whether a violation has occurred that will trigger a finding of "unlawful presence" will oftentimes occur either at the time the individual seeks to adjust to permanent resident status or returns from a trip abroad.

Here are examples of some problems DSOs/AROs foresee with the implementation of this memoranda:

1. **Recent SEVP Portal Release:** SEVP recently implemented the Student Portal through which F-1 students on post-completion optional practical training (OPT) or STEM OPT are allowed to report their personal and/or employment information, but there have been issues with the system. Students are required to report these changes with ten days, but

periodic problems with SEVIS and the Portal have resulted in incomplete information being available to students and instances when students have not been able to access the Portal. Additionally, some students have been confused about what information to enter and how to correctly enter it. All of this has resulted in incomplete and inaccurate data being reported to SEVIS through the Portal despite the best efforts of F-1 visa holders to report their information. Therefore, if USCIS relies on information from SEVIS (something the Policy memo mentions as a likely source of information for making decisions about violations of status), it is likely that there will be students judged to have violated their status based on bad data.

The new interpretation of the regulations could mean that these student could be judged to have violated their status and could be accruing unlawful presence without realizing it.

2. **Changes to Regulations Causing Previously Approved Actions to Become Violations:** SEVIS is set up so that school officials bear a great deal of responsibility for assisting F/J/M visa holders to maintain their status. As DSOs/AROs, we do our best to communicate with our students when there are changes to visa regulations and regulatory interpretations. This is not an easy task—especially when changes to regulations or regulatory interpretations require that we tell students something that is the reverse of what we previously correctly advised them.

In instances like the recent announcement restricting 3rd party employment for students on STEM OPT, it is very possible students will believe that they have done everything necessary to comply with the rules, only to apply to renew a visa or to change visa status in the future and be told that their actions (permissible when they started, but now not allowed due to changes in regulatory interpretations) were a violation of their status, and they have since accrued unlawful presence, barring them from changing visa status or re-entering the U.S.

These are but two recent examples of actions that could result in international students accruing unlawful presence **despite their attempts to follow the rules**. We foresee many additional problems and unintended consequences that will result from such a large and dramatic shift in regulatory interpretation.

These changes will likely result in confusion causing well-intentioned international students and exchange visitors to be found to have accrued unlawful presence due to innocent mistakes or misunderstandings of changing regulations. Due to the strict bars, these misunderstandings will have severe consequences. Consequences that do not match the severity of the status violation.

International students can choose to study anywhere in the world. Many international students who enroll at U.S. institutions are the best and brightest and receive offers to attend institutions around the world. While here, they excel in the classroom, and expose U.S. students to new perspectives and experiences which broaden their horizons.

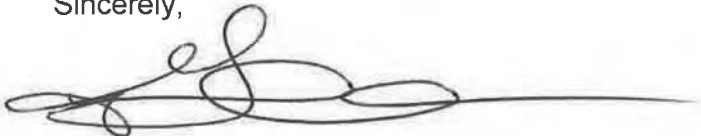
In order to ensure international students fulfill the purpose they came for, we must ensure regulations are structured and implemented in a fair and transparent manner. We must work to limit uncertainty so that they can focus on learning instead of tracking constantly changing regulations. This new policy will have the opposite result.

I ask you to take these concerns into consideration and rather than making the proposed changes, consider the following recommendations suggested by NAFSA (Association of International Educators):

- Do not implement any policy change until implementation has been fully coordinated with the Department of State and other DHS units such as CBP and SEVP.
- Exclude from the unlawful presence status violations that occurred under color of law, to avoid “gotcha” scenarios, where the student reasonably relied on the authorizations granted. For example, curricular practical training authorized in SEVIS that DHS later determines may have been improperly given, should not start the unlawful presence “clock” until DHS or an immigration judge makes a formal status determination.
- Apply the change of status/extension of stay tolling rules to reinstatement applications.
- Expand the sections describing examples where F, M, and J nonimmigrants “do not accrue unlawful presence in certain situations.” [draft Adjudicator’s Field Manual 40.9.2(b)(1)(E)(iii)].

Thank you for taking my comments into consideration

Sincerely,

A handwritten signature in dark ink, featuring a stylized, cursive script. The signature is followed by a long, horizontal, slightly wavy line that extends to the right.

Theresa GanglGhassemlouei
Assistant Director for Advising/PDSO/ARO

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June 7, 2018

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of the Director
20 Massachusetts Avenue, NW
Washington, DC 20529-2140

Submitted via email: publicengagementfeedback@uscis.dhs.gov

Re: USCIS Policy Memorandum: Accrual of Unlawful Presence and F, J, and M Nonimmigrants

Dear Madam or Sir:

I am an immigration attorney in practice for 35 years. I am very familiar with the issues regarding unlawful presence and the three, ten year and permanent bars to admission. I am writing to express my opposition and concerns regarding the new policy memorandum, "Accrual of Unlawful Presence and F, J, and M Nonimmigrants," posted by U.S. Citizenship and Immigration Services (USCIS) on May 11, 2018.

Briefly stated, the new memorandum will reverse more than 20 years of USCIS practice regarding the accrual of "unlawful presence," a legal term defined under section 212(a)(9)(B)(ii) of the Immigration and Nationality Act (INA) by reference to an individual who "is present in the United States after expiration of the period of stay authorized by the Attorney General or is present in the United States without being admitted or paroled." For nonimmigrant students and exchange visitors in the F, J, and M categories, legacy Immigration and Naturalization Service (INS) and USCIS have interpreted the statutory unlawful presence provisions to require notice to the individual of a status violation prior to the commencement of the unlawful presence clock. Such notice is provided in the context of the adjudication of a request for an immigration benefit by USCIS or a determination of a status violation by an immigration judge.

The USCIS guidance articulating this position states, “It must be emphasized that the accrual of unlawful presence neither begins on the date that a status violation occurs, nor on the day on which removal proceedings are initiated.”¹ This longstanding policy provides certainty in determining when unlawful presence begins to accrue, which the new policy does not.

As described in the May 11, 2018 memorandum, USCIS will now deem unlawful presence to have started accruing as of the day after the date that a status violation occurs, thus removing the critical procedural safeguard of providing notice to affected individuals that may find themselves subject to the three- and ten-year bars to admissibility. This raises serious questions regarding fundamental fairness and due process and will have a significant negative impact on the student, vocational, and exchange visitor communities.

In recognition of the fluidity of academic programs, F, M, and J nonimmigrants are not admitted to the U.S. until a date-certain. Instead, they are admitted for the “duration of their status,” or “D/S,” which means the student or exchange visitor can remain in the United States as long as they maintain their nonimmigrant status. This generally means the student must maintain a full course of study or remain in the exchange program, not engage in unauthorized employment or other unauthorized activities, and complete the academic or exchange program in a timely manner or obtain an extension.

What the new memorandum fails to recognize is that the question as to whether an individual has violated their nonimmigrant status is complex and nuanced. Students and exchange visitors can accidentally and unknowingly violate their status by dropping slightly below a full course of study, or by engaging in innocent, but unauthorized activity. For example, F-1 students are permitted to engage in work at a “qualifying on-campus job” for up to 20 hours per week while school is in session. Therefore, an F-1 student who inadvertently exceeds the 20-hour limit by just a couple of hours has technically violated his or her student status. In addition, a Designated School Official may make a good faith error in advising a student by authorizing a reduced course load that should not have been approved, thereby leading the student to unknowingly and unintentionally violate their status. This unfairness is compounded when the status violation also serves as the “trigger” for the accrual of unlawful presence by dependents of students and exchange visitors.

Additionally, the question as to whether an F, M or J visa holder has accrued unlawful presence so as to subject him or her to the three or ten year bar, is generally addressed when a subsequent visa is applied for at a US Consul abroad. This change would require the US consul to conduct an investigation and make a fact based determination whether a violation occurred that triggered the three or ten year bar. Such a complex issue would delay and compound the job of the US Consul and because of the nebulous nature of many of the facts in such cases, create extensive opportunity for erroneous decision making.

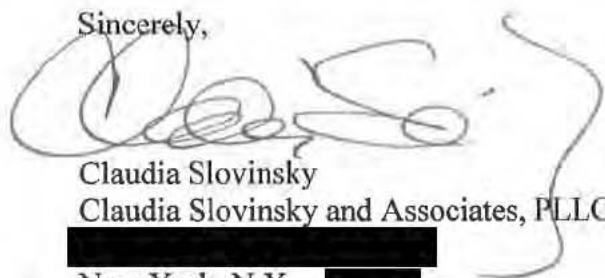
USCIS states that the purpose of the new guidance is to “reduce the number of overstays” and “to improve how USCIS implements the unlawful presence ground of

¹ See USCIS Memorandum, Consolidation of Guidance Concerning Unlawful Presence for Purposes of Sections 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I) of the Act,” (May 6, 2009), available at <http://www.aila.org/infonet/uscis-consolidation-guidance-unlawful-presence>.

inadmissibility." Unfortunately, this approach accomplishes neither of these goals and will instead unfairly punish a potentially significant portion of the student and exchange visitor population, further erode foreign student enrollments at U.S. colleges and universities, and unnecessarily damage the U.S. economy.

I urge USCIS to abandon this misguided directive and to maintain the unlawful presence guidance that has been in place for decades and ensures that fundamental fairness is a critical component in interpreting and implementing the unlawful presence statute.

Sincerely,

A handwritten signature in black ink, appearing to read 'Claudia Slovisky', with a long, sweeping horizontal line extending to the right.

Claudia Slovisky
Claudia Slovisky and Associates, PLLC

[REDACTED]
New York, N.Y. [REDACTED]
[REDACTED]

June 7, 2018

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of the Director
20 Massachusetts Avenue, NW
Washington, DC 20529-2140

Submitted via email: publicengagementfeedback@uscis.dhs.gov

Re: USCIS Policy Memorandum: Accrual of Unlawful Presence and F, J, and M Nonimmigrants

Dear Madam or Sir:

I am writing to express my opposition and concerns regarding the new policy memorandum, “Accrual of Unlawful Presence and F, J, and M Nonimmigrants,” posted by U.S. Citizenship and Immigration Services (USCIS) on May 11, 2018.

Briefly stated, the new memorandum will reverse more than 20 years of USCIS practice regarding the accrual of “unlawful presence,” a legal term defined under section 212(a)(9)(B)(ii) of the Immigration and Nationality Act (INA) by reference to an individual who “is present in the United States after expiration of the period of stay authorized by the Attorney General or is present in the United States without being admitted or paroled.” For nonimmigrant students and exchange visitors in the F, J, and M categories, legacy Immigration and Naturalization Service (INS) and USCIS have interpreted the statutory unlawful presence provisions to require notice to the individual of a status violation prior to the commencement of the unlawful presence clock. Such notice is provided in the context of the adjudication of a request for an immigration benefit by USCIS or a determination of a status violation by an immigration judge. The USCIS guidance articulating this position states, “It must be emphasized that the accrual of unlawful presence neither begins on the date that a status violation occurs, nor on the day on which removal proceedings are initiated.”¹ This longstanding policy provides certainty in determining when unlawful presence begins to accrue, which the new policy does not.

As described in the May 11, 2018 memorandum, USCIS will now deem unlawful presence to have started accruing as of the day after the date that a status violation occurs, thus removing the critical procedural safeguard of providing notice to affected individuals that may find themselves subject to the three- and ten-year bars to admissibility. This raises serious questions regarding fundamental fairness and due process and will have a significant negative impact on the student, vocational, and exchange visitor communities.

In recognition of the fluidity of academic programs, F, M, and J nonimmigrants are not admitted to the U.S. until a date-certain. Instead, they are admitted for the “duration of their status,” or

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Another example may be accepting employment which is later deemed by USCIS as not being related to the student’s degree.

USCIS states that the purpose of the new guidance is to “reduce the number of overstays” and “to improve how USCIS implements the unlawful presence ground of inadmissibility.” Unfortunately, this approach accomplishes neither of these goals and will instead unfairly punish a potentially significant portion of the student and exchange visitor population, further erode foreign student enrollments at U.S. colleges and universities, and unnecessarily damage the U.S. economy. I urge USCIS to abandon this misguided directive and to maintain the unlawful presence guidance that has been in place for decades and ensures that fundamental fairness is a critical component in interpreting and implementing the unlawful presence statute.

Sincerely,

Erica Loomba
Attorney at Law
Proskauer Rose LLP

LAW OFFICES OF MOKHIBER & MORETTI PLLC

GREAT FALLS, VIRGINIA [REDACTED] USA

TEL: [REDACTED]

June 8, 2018

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of the Director
20 Massachusetts Avenue, NW
Washington, DC 20529-2140

Submitted via email: publicengagementfeedback@uscis.dhs.gov

Re: USCIS Policy Memorandum: Accrual of Unlawful Presence and F, J, and M Nonimmigrants

Dear Madam or Sir:

I am writing to express my opposition and concerns regarding the new policy memorandum, "Accrual of Unlawful Presence and F, J, and M Nonimmigrants," posted by U.S. Citizenship and Immigration Services (USCIS) on May 11, 2018.

Briefly stated, the new memorandum will reverse more than 20 years of USCIS practice regarding the accrual of "unlawful presence," a legal term defined under section 212(a)(9)(B)(ii) of the Immigration and Nationality Act (INA) by reference to an individual who "is present in the United States after expiration of the period of stay authorized by the Attorney General or is present in the United States without being admitted or paroled." For nonimmigrant students and exchange visitors in the F, J, and M categories, legacy Immigration and Naturalization Service (INS) and USCIS have interpreted the statutory unlawful presence provisions to require notice to the individual of a status violation prior to the commencement of the unlawful presence clock. Such notice is provided in the context of the adjudication of a request for an immigration benefit by USCIS or a determination of a status violation by an immigration judge. The USCIS guidance articulating this position states, "It must be emphasized that the accrual of unlawful presence neither begins on the date that a status violation occurs, nor on the day on which removal proceedings are initiated."¹ This longstanding policy provides certainty in determining when unlawful presence begins to accrue, which the new policy does not.

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Sincerely,

Albert Mokhiber

Albert Mokhiber

June 8, 2018

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of the Director
20 Massachusetts Avenue, NW
Washington, DC 20529-2140

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USCIS states that the purpose of the new guidance is to “reduce the number of overstays” and “to improve how USCIS implements the unlawful presence ground of inadmissibility.” Unfortunately, this approach accomplishes neither of these goals and will instead unfairly punish a potentially significant portion of the student and exchange visitor population, further erode foreign student enrollments at U.S. colleges and universities, and unnecessarily damage the U.S. economy. I urge USCIS to abandon this misguided directive and to maintain the unlawful presence guidance that has been in place for decades and ensures that fundamental fairness is a critical component in interpreting and implementing the unlawful presence statute.

Sincerely,

Enola French

06/08/2018

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of the Director
20 Massachusetts Avenue, NW
Washington, DC 20529-2140

Submitted via email: publicengagementfeedback@uscis.dhs.gov

Re: USCIS Policy Memorandum: Accrual of Unlawful Presence and F, J, and M Nonimmigrants

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As described in the May 11, 2018 memorandum, USCIS will now deem unlawful presence to have started accruing as of the day after the date that a status violation occurs, thus removing the critical procedural safeguard of providing notice to affected individuals that may find themselves subject to the three- and ten-year bars to admissibility. This will be done only with F-1, J-1 and M non-immigrant. This raises serious questions regarding fundamental fairness and due process and will have a significant negative impact on the student, vocational, and exchange visitor communities.

I am a Principle Designate School Official at a large public institution. I can think of hundreds of students over the years that fell out of status for a variety of reasons. Sometimes it was their fault. Sometimes it was the fault of the DSO. They are students. Like domestic students they make mistakes. I have worked with these students to help them get back into status. That process is currently taking up to a year through USCIS. None of these students were malicious in their intent, or dangerous. Most of them just dropped a class they were about to fail and didn't notify their DSO. Some of them took a semester longer to finish their degree and failed to extend their F-1 program/document. Some of them were struggling financially because of changes in the circumstances of their families back home and dropped out for a semester. Some of them were wrongly terminated by their DSO and did nothing to violate their status.

If this is left to stand and moves forward it is possible these students could be barred from the US for long periods of time. This change also only applies to F-1, J-1 and M students. What is rational or fair about that! There is an alphabet soup of other non-immigrant classifications. Why single out a population that is already monitored and tracked in SEVIS at great expense and more than any other. Is this population particularly dangerous!? Undesirable?? These are

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people that have come to pursue degrees in the US, to our great economic benefit. They are just the type of non-immigrant our system should encourage to come but they alone are singled out in this policy and could be barred for years from getting a visa should they stumble along the way! This policy will accomplish none of the goals it purports to. It will only send another strong message that people that want to come to get an education in the US (ideal non-immigrants in most cases) are looked on with particular suspicion and are not welcome.

Please do not apply this unfair, unnecessary, unhelpful, and severe rule to these students that we want to encourage to come. Our number of international students in the US are already going down as Canada, the UK, Australia and New Zealand capture more and more of this education export market (US education is one of our largest exports!). We are already monitoring these students at great expense. Please act in the best interest of the US and alter or rescind this memo!

Sincerely,

A handwritten signature in dark ink, appearing to read 'Richard Porter', with a long horizontal flourish extending to the right.

Richard Porter

June 8, 2018

U.S. Citizenship & Immigration Services
Department of Homeland Security
20 Massachusetts Ave, NW
Washington, DC 20529

Re: Accrual of Unlawful Presence and F, J, and M Nonimmigrants

Dear USCIS,

I am writing in regard to the recommendations made in "Policy Memorandum: Accrual of Unlawful Presence and F, J, and M Nonimmigrants (PM-602-1060)" of May 10, 2018. This memorandum represents a radical change in USCIS's interpretation and application of the regulations related to the accrual of unlawful presence by those in student (F nonimmigrant) or exchange visitor (J nonimmigrant) status and their dependents while in the United States.

I work at the University of South Florida, and we have international students from more than 145 nations and faculty from across the globe. The international students, visiting scholars, researchers, staff and faculty on our campuses bring unique experiences and perspectives to our classrooms, important ideas for discovery and innovation to our research labs, and exciting leadership to our campus community.

As the PDSO (Primary Designated School Official) and RO (Responsible Officer), I was alarmed to read these proposed changes. A great deal of the daily work of my staff and myself consists of advising international students and scholars on how to maintain their visa status (and that of their dependents). This is something that the vast majority of international students and scholars deeply and sincerely want to do. Unlike their domestic counterparts, they need to remain aware of visa regulations while also balancing the demands of student life and meeting all the requirements of their academic program.

While changes in regulations are to be expected, these proposed changes are especially problematic because they are a departure from the long-standing, common sense interpretation of visa regulations that has been in place for over 20 years. Furthermore, the changes create a system where F/J visa holders may be found to have violated their visa status years after the violation supposedly occurred. This is especially troubling since this

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memorandum attaches the possibility that this violation could result in individuals being barred from entering the U.S. for three years, ten years, or permanently.

Although the announcement regarding these changes comes with sufficient notice for individuals who are currently out of status to take steps to remedy their visa status before they begin accruing unlawful presence, this new interpretation will cause a great deal of uncertainty for F/J visa holders moving forward. Here are some specific examples of some problems DSOs/AROs foresee:

1. **Recent SEVP Portal Release:** SEVP recently implemented a Portal through which F-1 students on post-completion optional practical training (OPT) or STEM OPT are allowed to report changes to their personal and/or employment information. Students are required to report these changes with ten days, but periodic problems with SEVIS and the Portal have resulted in incomplete information being available to students and instances when students have not been able to access the Portal. Additionally, some students have been confused about what information to enter and how to correctly enter it. All of this has resulted in the reporting of incomplete and inaccurate data to SEVIS through the Portal despite the best efforts of F-1 visa holders to report their information. Therefore, if USCIS relies on information from SEVIS (something the Policy memo mentions as a likely source of information for making decisions about violations of status), it is likely that there will be students judged to have violated their status based on this bad data.

While DSOs/AROs and others have, historically, been able to help students resolve these data issues, the new interpretation of the regulations could mean that these student could be judged to have violated their status and could be accruing unlawful presence without realizing it.

2. **Changes to Regulations Causing Previously Approved Actions to Become Violations:** The Student Exchange Visitor System (SEVIS) is set up so that school officials bear a great deal of responsibility for assisting F/J visa holders to maintain their status. As DSOs/AROs, we do our best to communicate with our students when there are changes to visa regulations and regulatory interpretations. This is not an easy task—especially when changes to regulations or regulatory interpretations require that we tell students something that is the reverse of what we previously correctly advised them.

For example, with the recent announcement restricting third party employment for students on STEM OPT, it is very possible students will believe that they have done

everything necessary to comply with the rules, only to be told that they are out of status during a visa renewal or application to change visa status. Their actions, which were permissible when they started, are now not allowed due to changes in regulatory interpretations, and they have since accrued unlawful presence, barring them from changing visa status or re-entering the U.S.

These are only two recent examples of actions that could result in international students accruing unlawful presence despite their attempts to follow the rules. We foresee many additional problems and unintended consequences that will result from such a large and dramatic shift in regulatory interpretation.

In conclusion

The USCIS press release for this memorandum states, "USCIS is dedicated to our mission of ensuring the integrity of the immigration system. F, J, and M nonimmigrants are admitted to the United States for a specific purpose, and when that purpose has ended, we expect them to depart, or to obtain another, lawful immigration status." This change, however, will not contribute meaningfully to that objective. Instead, it will likely result in confusion and well-meaning international students and exchange visitors being found to have accrued unlawful presence due to innocent mistakes or misunderstandings of changing regulations. Due to the strict bars that will be applied to these individuals due to these changes, these misunderstandings could have severe consequences.

We are at a point in time where our international students can choose to study anywhere in the world. Many international students who enroll at U.S. institutions are the best of their classes at home, and they receive offers to attend institutions around the world. They choose to come to the United States because they have determined an institution is the best option for them to pursue their chosen field of study. While here, they excel in their classes, and they provide new perspectives and experiences to their classmates and the broader university community.

If we want to ensure the students fulfill the "specific purpose" they receive their visa (obtaining an education at a U.S. institution), we must ensure our laws and regulations are structured and implemented in a fair and transparent manner. We must work to limit uncertainty so that students can focus on learning instead of tracking constantly changing regulations. This new policy has the opposite result.

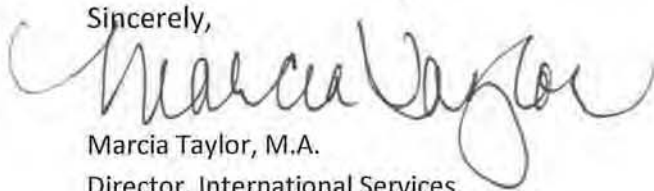
Recommendations

I urge you to take these concerns into consideration, and rather than making the proposed changes, consider the following recommendations suggested by NAFSA (Association of International Educators):

- Leave in place the current policy, which has served for over 20 years. Neither DHS nor legacy INS ever published regulations to implement this important area of law. If the agency wishes to implement such a drastic change to longstanding common interpretation of the law, it must be done through the notice and comment process.
- Do not implement any policy change until implementation has been fully coordinated with the Department of State and other DHS units such as CBP and SEVP.
- Exclude from the unlawful presence count any status violations that occurred under color of law, to avoid "gotcha" scenarios, where the student reasonably relied on the authorizations granted. For example, curricular practical training authorized in SEVIS that DHS later determines may have been improperly given, should not start the unlawful presence "clock" until DHS or an immigration judge makes a formal status determination.
- Apply the change of status/extension of stay tolling rules to reinstatement applications.
- Expand the sections describing examples where F, M, and J nonimmigrants "do not accrue unlawful presence in certain situations." [draft Adjudicator's Field Manual 40.9.2(b)(1)(E)(iii)].

Thank you for the opportunity to comment.

Sincerely,



Marcia Taylor, M.A.

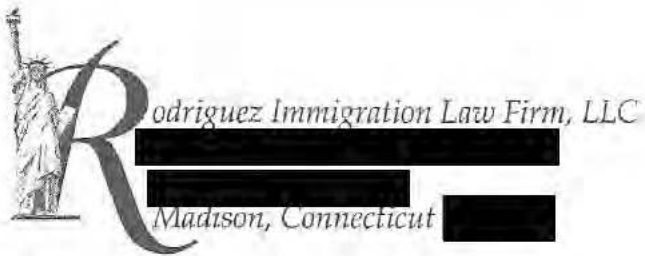
Director, International Services

SEVIS PDSO and RO

USF World | University of South Florida | 4202 East Fowler Ave, CGS101 | Tampa, FL 33620

P: (813) 974-5206 | F: (813) 974-0491 | <http://global.usf.edu/iss/>

GC CAR000588



Jennifer Strait Rodriguez
Admitted in CT & NY

June 7, 2018

Office of the Director
U.S. Citizenship and Immigration Services
20 Massachusetts Avenue, NW
Washington, DC 20529-2140

Re: USCIS Policy Memorandum:
Accrual of Unlawful Presence and F, J, and M Nonimmigrants

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Telephone: [REDACTED]

Email: [REDACTED]

Fax Number: [REDACTED]

Website: www.jsrodriguezlaw.com

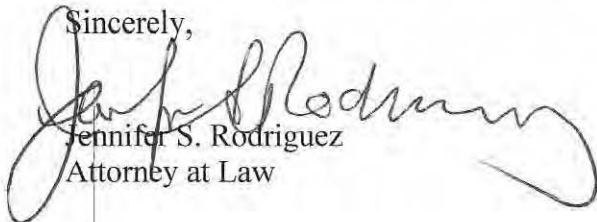
GC CAR 000589

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USCIS states that the purpose of the new guidance is to “reduce the number of overstays” and “to improve how USCIS implements the unlawful presence ground of inadmissibility.” Unfortunately, this approach accomplishes neither of these goals and will instead unfairly punish a potentially significant portion of the student and exchange visitor population, further erode foreign student enrollments at U.S. colleges and universities, and unnecessarily damage the U.S. economy. I urge USCIS to abandon this misguided directive and to maintain the unlawful presence guidance that has been in place for decades and ensures that fundamental fairness is a critical component in interpreting and implementing the unlawful presence statute.

Sincerely,



Jennifer S. Rodriguez
Attorney at Law

June 8, 2018

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
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Other examples include:

- Due to feeling pressured to keep their GPA high not to lose their scholarship, students sometimes drop a class at the end of their semester to avoid a low grade and fall below full time enrollment. Student’s SEVIS record will have to be terminated. However, the student is eligible to file for re-instatement. However, since those re-instatement applications take more than 6 month (often up to a year) to get adjudicated, implementing the new rule would cause this student to accrue unlawful presence if the application would get denied.

USCIS states that the purpose of the new guidance is to “reduce the number of overstays” and “to improve how USCIS implements the unlawful presence ground of inadmissibility.”

Unfortunately, this approach accomplishes neither of these goals and will instead unfairly punish a potentially significant portion of the student and exchange visitor population, further erode foreign student enrollments at U.S. colleges and universities, and unnecessarily damage the U.S. economy. I urge USCIS to abandon this misguided directive and to maintain the unlawful presence guidance that has been in place for decades and ensures that fundamental fairness is a critical component in interpreting and implementing the unlawful presence statute.

Sincerely,

Karin Senft

June 7, 2018

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of the Director
20 Massachusetts Avenue, NW
Washington, DC 20529-2140

Submitted via email: publicengagementfeedback@uscis.dhs.gov

**Re: USCIS Policy Memorandum: Accrual of Unlawful Presence and F, J,
and M Nonimmigrants**

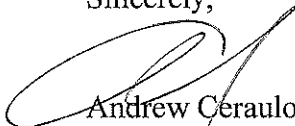
Dear Madam or Sir:

I am writing to express my opposition to the new policy memorandum, "Accrual of Unlawful Presence and F, J, and M Nonimmigrants," posted by U.S. Citizenship and Immigration Services (USCIS) on May 11, 2018.

The new memorandum will subject F, J and M aliens to greater scrutiny than other non-immigrant visa holders. Other non-immigrant visa holders that violate the terms of their stay are not subject to unlawful presence penalties.

A consequence of such a policy for F, J and M aliens will be that many such visa holders who have violated their status will not leave the U.S, since they will not be able to return as a result of their violations. Those that remain in the U.S. will wait for a change in the law, a new policy memo from a new administration or may get married to a U.S. citizen.

Sincerely,



Andrew Ceraulo, Esq.

[REDACTED]
New York, N.Y. [REDACTED]



LEVIN SANTALONE LLP

ATTORNEYS AT LAW

LARCHMONT, NY

TEL:

FAX:

June 8, 2018

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of the Director
20 Massachusetts Avenue, NW
Washington, DC 20529-2140

Submitted via email: publicengagementfeedback@uscis.dhs.gov

Re: USCIS Policy Memorandum: Accrual of Unlawful Presence and F, J, and M Nonimmigrants

Dear Madam or Sir:

I am writing to express my opposition and concerns regarding the new policy memorandum, "Accrual of Unlawful Presence and F, J, and M Nonimmigrants," posted by U.S. Citizenship and Immigration Services (USCIS) on May 11, 2018.

Briefly stated, the new memorandum will reverse more than 20 years of USCIS practice regarding the accrual of "unlawful presence," a legal term defined under section 212(a)(9)(B)(ii) of the Immigration and Nationality Act (INA) by reference to an individual who "is present in the United States after expiration of the period of stay authorized by the Attorney General or is present in the United States without being admitted or paroled." For nonimmigrant students and exchange visitors in the F, J, and M categories, legacy Immigration and Naturalization Service (INS) and USCIS have interpreted the statutory unlawful presence provisions to require notice to the individual of a status violation prior to the commencement of the unlawful presence clock. Such notice is provided in the context of the adjudication of a request for an immigration benefit by USCIS or a determination of a status violation by an immigration judge. The USCIS guidance articulating this position states, "It must be emphasized that the accrual of unlawful presence neither begins on the date that a status violation occurs, nor on the day on which removal proceedings are initiated." This longstanding policy provides certainty in determining when unlawful presence begins to accrue, which the new policy does not.

As described in the May 11, 2018 memorandum, USCIS will now deem unlawful presence to have started accruing as of the day after the date that a status violation occurs, thus removing the critical procedural safeguard of providing notice to affected individuals that may find themselves subject to the three- and ten-year bars to admissibility. This raises serious questions regarding fundamental fairness and due process and will have a significant negative impact on the student, vocational, and exchange visitor communities.

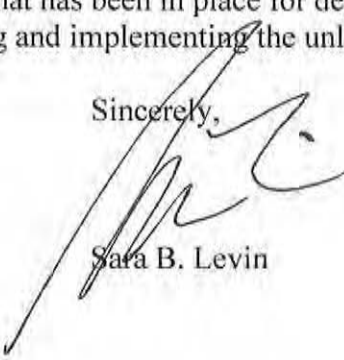
In recognition of the fluidity of academic programs, F, M, and J nonimmigrants are not admitted to the U.S. until a date-certain. Instead, they are admitted for the "duration of their status," or "D/S," which means the student or exchange visitor can remain in the United States as long as they maintain their nonimmigrant status. This generally means the student must maintain a full course of study or remain in the exchange program, not engage in unauthorized employment or other unauthorized activities, and complete the academic or exchange program in a timely manner or obtain an extension. What the new memorandum fails to recognize is that the question as to whether an individual has violated their nonimmigrant status is complex and nuanced. Students and exchange visitors can accidentally and unknowingly violate their status by dropping slightly below a full course of study, or by engaging in innocent, but unauthorized activity. For example, F-1 students are permitted to engage in work at a "qualifying on-campus job" for up to 20 hours per week while school is in session. Therefore, an F-1 student who inadvertently exceeds the 20-hour limit by just a couple of hours has technically violated his or her student status. In addition, a Designated School Official may make a good faith error in advising a student by authorizing a reduced course load that should not have been approved, thereby leading the student to unknowingly and unintentionally violate their status. This unfairness is compounded when the status violation also serves as the "trigger" for the accrual of unlawful presence by dependents of students and exchange visitors.

Other examples from my own practice include:

- A 19 year old college student who developed a fast growing tumor in her breast. She went from a doctor's visit to immediate serious surgery, and did not finish her semester courses.
- An 18 year old college student who babysat for her professor, and accepted cash payment at the professor's insistence.
- A high school student who was moved from one private school to another, where the second school was not an F-1 SEVIS school.

USCIS states that the purpose of the new guidance is to "reduce the number of overstays" and "to improve how USCIS implements the unlawful presence ground of inadmissibility." Unfortunately, this approach accomplishes neither of these goals and will instead unfairly punish a potentially significant portion of the student and exchange visitor population, further erode foreign student enrollments at U.S. colleges and universities, and unnecessarily damage the U.S. economy. I urge USCIS to abandon this misguided directive and to maintain the unlawful presence guidance that has been in place for decades and ensures that fundamental fairness is a critical component in interpreting and implementing the unlawful presence statute.

Sincerely,



Sara B. Levin



LAW OFFICE OF PAUL S. ZOLTAN

DALLAS, TEXAS

PHONE: [REDACTED]

FAX [REDACTED]

June 8, 2018

Kirstjen M. Nielsen, Secretary
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of the Director
20 Massachusetts Avenue, NW
Washington, DC 20529-2140

Re: USCIS Policy Memorandum: Accrual of Unlawful Presence and F, J, and M
Nonimmigrants

Dear Secretary Nielsen:

I write to express my opposition to the new policy memorandum, "Accrual of Unlawful Presence and F, J, and M Nonimmigrants," posted by U.S. Citizenship and Immigration Services (USCIS) on May 11, 2018.

For nonimmigrant students and exchange visitors in the F, J, and M categories, legacy Immigration and Naturalization Service (INS) and USCIS have interpreted the statutory unlawful presence provisions to require notice to the individual of a status violation prior to the commencement of the unlawful presence clock. Such notice is provided in the context of the adjudication of a request for an immigration benefit by USCIS or a determination of a status violation by an immigration judge. This longstanding policy provides certainty in determining when unlawful presence begins to accrue, which the new policy does not.

Deeming unlawful presence to have started accruing as of the day after the date that a status violation occurs removes critical procedural safeguards and violates due process. It will grievously harm a great many people admitted to the U.S. as F, M, and J nonimmigrants for an indeterminate period of time. Such "duration of their status" or "D/S" admissions require each student to maintain a full course of study or remain in the exchange program, forbid them from engaging in unauthorized employment or other unauthorized activities, and compel them to promptly complete the academic or exchange program or obtain an extension.

What the new memorandum fails to recognize is that the question as to whether an individual has violated their nonimmigrant status is complex and nuanced. Students and exchange visitors can accidentally and unknowingly violate their status by dropping slightly below a full course of study, or by engaging in innocent, but unauthorized activity.

USCIS states that the purpose of the new guidance is to "reduce the number of overstays" and "to improve how USCIS implements the unlawful presence ground of inadmissibility." Unfortunately, this approach accomplishes neither of these goals and will instead unfairly punish a potentially significant portion of the student and exchange visitor population, further erode foreign student enrollments at U.S. colleges and universities, and unnecessarily damage the U.S. economy. I urge USCIS to abandon this misguided directive and to maintain the unlawful presence guidance that has been in place for decades and ensures that fundamental fairness is a critical component in interpreting and implementing the unlawful presence statute.

Sincerely,

Paul S. Zoltan

June 7, 2018

Re: Accrual of Unlawful Presence and F, J, and M Nonimmigrants

Dear USCIS,

I am writing in regard to the recommendations made in "Policy Memoranda: Accrual of Unlawful Presence and F, J, and M Nonimmigrants (PM-602-1060)." These proposals represent a radical change in USCIS's interpretation and application of the regulations related to the accrual of unlawful presence by those in student (F nonimmigrant), exchange visitor (J nonimmigrant), or vocational student (M nonimmigrant) status and their dependents while in the United States.

I work at the University of Minnesota, and we have international students from more than 135 nations and faculty from across the globe. The international students, researchers, staff and faculty on our campuses bring unique experiences and perspectives to our classrooms, important ideas for discovery and innovation to our research labs, and exciting leadership to our campus community.

I was alarmed to read these proposed changes. A great deal of my daily work consists of advising international students and scholars on how to maintain their visa status (and that of their dependents). This is something that the vast majority of international students and scholars deeply and sincerely want to do, and this means they need to remain aware of visa regulations while also balancing the demands all students experience along with their institution's requirements.

There have been significant discussions amongst international educators since this memorandum was released regarding how we will assist F/J/M visa holders in understanding these new policies without inadvertently engaging in the unauthorized practice of law. Absent an unlawful presence finding by DHS or an Immigration Judge that the F or J individual has violated status, Universities who sponsor F and J nonimmigrants will - *de facto* - become charged with this legal task. This creates immense risk and liability to institutions of higher education as fact finder and arbitrator of how a potential violation of status may turn duration of status (D/S) into unlawful presence with a bar to re-entry. The current practice provides certainty and clarity around the important determination of accrued unlawful presence time and whether a 3 or 10 year bar will attach. The proposed policy places numerous liabilities on F and J program sponsors in "helping" the nonimmigrant make these determinations in order to take corrective action or otherwise cure the status deficiency.

While changes in regulations are to be expected, these proposed changes are especially problematic because they are a departure from the long-standing, common sense interpretation of visa regulations that has been in place for over 20 years, and it creates a system where F/J/M visa holders may be found to have violated their visa status years after the violation supposedly occurred—something that is especially troubling since this memorandum attaches the possibility that this violation could result in individuals being barred from entering the U.S. for three years, ten years, or permanently.

Although the announcement regarding these changes comes with sufficient notice for individuals who are currently out of status to take steps to remedy their visa status before they begin accruing unlawful presence, this new interpretation will cause a great deal of uncertainty for F/J/M visa holders moving

Driven to DiscoverSM

forward. Here are some specific examples of some problems DSOs/AROs foresee with the implementation of this memoranda:

1. **Recent SEVP Portal Release:** SEVP recently implemented a Portal through which F-1 students on post-completion optional practical training (OPT) or STEM OPT are allowed to report changes to their personal and/or employment information, but there have been issues with the system. Students are required to report these changes with ten days, but periodic problems with SEVIS and the Portal have resulted in incomplete information being available to students and instances when students have not been able to access the Portal. Additionally, some students have been confused about what information to enter and how to correctly enter it. All of this has resulted in incomplete and inaccurate data being reported to SEVIS through the Portal despite the best efforts of F-1 visa holders to report their information. Therefore, if USCIS relies on information from SEVIS (something the Policy memo mentions as a likely source of information for making decisions about violations of status), it is likely that there will be students judged to have violated their status based on this bad data.

While DSOs/AROs and others have been, historically, been able to help students resolve these data issues, the new interpretation of the regulations could mean that these student could be judged to have violated their status and could be be accruing unlawful presence without realizing it.

2. **Changes to Regulations Causing Previously Approved Actions to Become Violations:** The student and scholar visa system (SEVIS) is set up so that school officials bear a great deal of responsibility for assisting F/J/M visa holders to maintain their status. As DSOs/AROs, we do our best to communicate with our students when there are changes to visa regulations and regulatory interpretations. This is not an easy task—especially when changes to regulations or regulatory interpretations require that we tell students something that is the reverse of what we previously correctly advised them.

In instances like the recent announcement restricting 3rd party employment for students on STEM OPT, it is very possible students will believe that they have done everything necessary to comply with the rules, only to apply to renew a visa or to change visa status in the future and be told that their actions (permissible when they started, but now not allowed due to changes in regulatory interpretations) were a violation of their status, and they have since accrued unlawful presence, barring them from changing visa status or re-entering the U.S.

These are only two recent examples of actions that could result in international students accruing unlawful presence despite their attempts to follow the rules. We foresee many additional problems and unintended consequences that will result from such a large and dramatic shift in regulatory interpretation.

In conclusion

The USCIS press release for this memorandum quotes USCIS Director L. Francis Cissna as saying, "USCIS is dedicated to our mission of ensuring the integrity of the immigration system. F, J, and M nonimmigrants are admitted to the United States for a specific purpose, and when that purpose has ended, we expect them to depart, or to obtain another, lawful immigration status." This change,

however, will not contribute meaningfully to that objective. Instead, it will likely result in confusion that will mean well-meaning international students and exchange visitors could be found to have accrued unlawful presence due to innocent mistakes or misunderstandings of changing regulations. Due to the strict bars that will be applied to these individuals due to these changes, these misunderstandings could have severe consequences.

We are at a point in time where our international students can choose to study anywhere in the world. Many international students who enroll at U.S. institutions are the best of their classes at home, and they receive offers to attend institutions around the world. They choose to come to the United States because they have determined an institution is the best option for them to pursue their chosen field of study. While here, they excel in their classes, and they provide new perspectives and experiences to their classmates and the broader university community.

If we want to ensure the students fulfill the "specific purpose" they receive their visa (obtaining an education at a U.S. institution), we must ensure our laws and regulations are structured and implemented in a fair and transparent manner. We must work to limit uncertainty so that students can focus on learning instead of tracking constantly changing regulations. This new policy has the opposite result.

Recommendations

I urge you to take these concerns into consideration and rather than making the proposed changes, consider the following recommendations suggested by NAFSA (Association of International Educators):

- Leave in place the current policy, which has served for over 20 years. Neither DHS nor legacy INS ever published regulations to implement this important area of law. If the agency wishes to implement such a drastic change to longstanding common interpretation of the law, it must be done through the notice and comment process.
- Do not implement any policy change until implementation has been fully coordinated with the Department of State and other DHS units such as CBP and SEVP.
- Exclude from the unlawful presence count any status violations that occurred under color of law, to avoid "gotcha" scenarios, where the student reasonably relied on the authorizations granted. For example, curricular practical training authorized in SEVIS that DHS later determines may have been improperly given, should not start the unlawful presence "clock" until DHS or an immigration judge makes a formal status determination.
- Apply the change of status/extension of stay tolling rules to reinstatement applications.
- Expand the sections describing examples where F, M, and J nonimmigrants "do not accrue unlawful presence in certain situations." [draft Adjudicator's Field Manual 40.9.2(b)(1)(E)(iii)].

Sincerely,



Molly Hoffman
H-1B Program Director
University of Minnesota

June 8, 2018

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of the Director
20 Massachusetts Avenue, NW
Washington, DC 20529-2140

Submitted via email: publicengagementfeedback@uscis.dhs.gov

Re: USCIS Policy Memorandum: Accrual of Unlawful Presence and F, J, and M Nonimmigrants

Dear Madam or Sir:

I am writing to express my opposition and concerns regarding the new policy memorandum, “Accrual of Unlawful Presence and F, J, and M Nonimmigrants,” posted by U.S. Citizenship and Immigration Services (USCIS) on May 11, 2018.

Briefly stated, the new memorandum will reverse more than 20 years of USCIS practice regarding the accrual of “unlawful presence,” a legal term defined under section 212(a)(9)(B)(ii) of the Immigration and Nationality Act (INA) by reference to an individual who “is present in the United States after expiration of the period of stay authorized by the Attorney General or is present in the United States without being admitted or paroled.” For nonimmigrant students and exchange visitors in the F, J, and M categories, legacy Immigration and Naturalization Service (INS) and USCIS have interpreted the statutory unlawful presence provisions to require notice to the individual of a status violation prior to the commencement of the unlawful presence clock. Such notice is provided in the context of the adjudication of a request for an immigration benefit by USCIS or a determination of a status violation by an immigration judge. The USCIS guidance articulating this position states, “It must be emphasized that the accrual of unlawful presence neither begins on the date that a status violation occurs, nor on the day on which removal proceedings are initiated.”¹ This longstanding policy provides certainty in determining when unlawful presence begins to accrue, which the new policy does not.

As described in the May 11, 2018 memorandum, USCIS will now deem unlawful presence to have started accruing as of the day after the date that a status violation occurs, thus removing the critical procedural safeguard of providing notice to affected individuals that may find themselves subject to the three- and ten-year bars to admissibility. This raises serious questions regarding fundamental fairness and due process and will have a significant negative impact on the student, vocational, and exchange visitor communities.

In recognition of the fluidity of academic programs, F, M, and J nonimmigrants are not admitted to the U.S. until a date-certain. Instead, they are admitted for the “duration of their status,” or

¹ See USCIS Memorandum, Consolidation of Guidance Concerning Unlawful Presence for Purposes of Sections 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I) of the Act,” (May 6, 2009), available at <http://www.aila.org/infonet/uscis-consolidation-guidance-unlawful-presence>.

“D/S,” which means the student or exchange visitor can remain in the United States as long as they maintain their nonimmigrant status. This generally means the student must maintain a full course of study or remain in the exchange program, not engage in unauthorized employment or other unauthorized activities, and complete the academic or exchange program in a timely manner or obtain an extension. What the new memorandum fails to recognize is that the question as to whether an individual has violated their nonimmigrant status is complex and nuanced. Students and exchange visitors can accidentally and unknowingly violate their status by dropping slightly below a full course of study, or by engaging in innocent, but unauthorized activity. For example, F-1 students are permitted to engage in work at a “qualifying on-campus job” for up to 20 hours per week while school is in session. Therefore, an F-1 student who inadvertently exceeds the 20-hour limit by just a couple of hours has technically violated his or her student status. In addition, a Designated School Official may make a good faith error in advising a student by authorizing a reduced course load that should not have been approved, thereby leading the student to unknowingly and unintentionally violate their status. This unfairness is compounded when the status violation also serves as the “trigger” for the accrual of unlawful presence by dependents of students and exchange visitors.

Other examples include:

- A student who unknowingly takes more than the allowable amount of online-only coursework, due to miscommunication with the academic advisor or due to poor advising from the academic advisor.
- A student who may accidentally fall out of status due to extenuating circumstances, such as a medical issues (injury, mental health) and forgets to consult with their Designated School Office for assistance on receiving an authorized medical reduced course load, or struggles financially due to unexpected loss of funding.

USCIS states that the purpose of the new guidance is to “reduce the number of overstays” and “to improve how USCIS implements the unlawful presence ground of inadmissibility.” Unfortunately, this approach accomplishes neither of these goals and will instead unfairly punish a potentially significant portion of the student and exchange visitor population, further erode foreign student enrollments at U.S. colleges and universities, and unnecessarily damage the U.S. economy. I urge USCIS to abandon this misguided directive and to maintain the unlawful presence guidance that has been in place for decades and ensures that fundamental fairness is a critical component in interpreting and implementing the unlawful presence statute.

Sincerely,

Christy Czerwien

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of the Director
20 Massachusetts Avenue, NW
Washington, DC 20529-2140

Submitted via email: publicengagementfeedback@uscis.dhs.gov

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This new memorandum would reverse over 20 years of USCIS practice regarding the accrual of "unlawful presence." For nonimmigrant students and exchange visitors in the F, J, and M categories, legacy Immigration and Naturalization Service (INS) and USCIS have interpreted the statutory unlawful presence provisions to require notice to the individual of a status violation prior to the commencement of the unlawful presence clock. Such notice is provided in the context of the adjudication of a request for an immigration benefit by USCIS or a determination of a status violation by an immigration judge. The USCIS guidance articulating this position states, "It must be emphasized that the accrual of unlawful presence neither begins on the date that a status violation occurs, nor on the day on which removal proceedings are initiated."¹ This longstanding policy provides certainty in determining when unlawful presence begins to accrue, which the new policy does not. The law must provide certainty to those who are living under it and trying to abide by it.

As described in the May 11, 2018 memorandum, USCIS will now deem unlawful presence to have started accruing as of the day after the date that a status violation occurs, thus removing the critical procedural safeguard of providing notice to affected individuals that may find themselves subject to the three- and ten-year bars to admissibility. This raises serious questions regarding fundamental fairness and due process and will have a significant negative impact on the student, vocational, and exchange visitor communities.

In recognition of the fluidity of academic programs, F, M, and J nonimmigrants are not admitted to the U.S. until a date-certain. Instead, they are admitted for the "duration of their status," or "D/S," which means the student or exchange visitor can remain in the United States as long as they maintain their

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nonimmigrant status. This generally means the student must maintain a full course of study or remain in the exchange program, not engage in unauthorized employment or other unauthorized activities, and complete the academic or exchange program in a timely manner or obtain an extension. What the new memorandum fails to recognize is that the question as to whether an individual has violated their nonimmigrant status is complex and nuanced. Students and exchange visitors can accidentally and unknowingly violate their status by dropping slightly below a full course of study, or by engaging in innocent, but unauthorized activity. For example, F-1 students are permitted to engage in work at a “qualifying on-campus job” for up to 20 hours per week while school is in session. Therefore, an F-1 student who inadvertently exceeds the 20-hour limit by just a couple of hours has technically violated his or her student status. In addition, a Designated School Official may make a good faith error in advising a student by authorizing a reduced course load that should not have been approved, thereby leading the student to unknowingly and unintentionally violate their status. This unfairness is compounded when the status violation also serves as the “trigger” for the accrual of unlawful presence by dependents of students and exchange visitors.

In my practice I have seen specific examples of DSOs who are new to the position, filling in for someone on leave, or just not well-trained in the SEVIS system who have made minor errors in the system regarding employment authorization or course loads. These minor errors not even committed by student him/herself could not have catastrophic, long-term effects on the unwitting students who trust these officials to manage their status.

USCIS states that the purpose of the new guidance is to “reduce the number of overstays” and “to improve how USCIS implements the unlawful presence ground of inadmissibility.” Unfortunately, this approach accomplishes neither of these goals and will instead unfairly punish a potentially significant portion of the student and exchange visitor population, further erode foreign student enrollments at U.S. colleges and universities, and unnecessarily damage the U.S. economy. I urge USCIS to abandon this misguided directive and to maintain the unlawful presence guidance that has been in place for decades and ensures that fundamental fairness is a critical component in interpreting and implementing the unlawful presence statute.

Sincerely,

A handwritten signature in black ink, appearing to read "Kelley A. Chenhalls". The signature is fluid and cursive, with the first name "Kelley" being more prominent.

Kelley A. Chenhalls
Attorney at Law



June 8, 2018

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of the Director
20 Massachusetts Avenue, NW
Washington, DC 20529
Submitted via email: publicengagementfeedback@uscis.dhs.gov

Re: USCIS Policy Memorandum Accrual of Unlawful Presence and F, J, and M Nonimmigrants, PM-602-1060.

Dear Sir or Madam,

This is public comment on the USCIS policy memorandum Accrual of Unlawful Presence and F, J, and M Nonimmigrants, posted by U.S. Citizenship and Immigration Services (USCIS) on May 11, 2018.

The University of Massachusetts (UMass) is a public institution established by the Commonwealth of Massachusetts with more than 17,000 university faculty and staff and nearly 75,000 students enrolled at our five campuses located in Amherst, Boston, Dartmouth, Lowell, and Worcester. Each campus is individually certified by the Department of Homeland Security (DHS), Student and Exchange Visitor Program (SEVP) to administer and issue documents in support of F International Student nonimmigrant status as well as individually designated by SEVP to administer and issue documents in support of certain J Exchange Visitors nonimmigrant classifications. Additionally, UMass employs individuals work authorized under F and J nonimmigrant status in various positions throughout the UMass system, depending on underlying requirements of the nonimmigrant classification.

As both employer and SEVP program sponsor of F and J nonimmigrants, UMass is alarmed by the swift and radical departure from long standing statutory law, federal regulation and agency policy on unlawful presence as it pertains to these nonimmigrants. Further, UMass is deeply concerned by the significant institutional liability and risk that this policy change will likely have on F and J program administrators – largely institutes of higher education.

The legal concerns are as follows:

1. The new policy violates the clear language of the Immigration & Nationality Act

Congress established Unlawful Presence as a new ground of exclusion in 1996, effective April 1, 1997, in which it defined unlawful presence at Section 212(a)(9)(B)(ii) of the Act:

“(ii) Construction of unlawful presence. - For purposes of this paragraph, an alien is deemed to be unlawfully present in the United States if the alien is present in the United States *after the expiration of the period of stay* authorized by the Attorney General (now DHS) or is present in the United States without being admitted or paroled.” (Emphasis added)

Shrewsbury, MA

P:

The Service had historically applied Congress' definition of unlawful presence to nonimmigrants, such as H-1Bs and O-1s who were admitted to a date certain and who had remained after the expiration of that date certain.

Due to the changeable nature of their stay, almost all F, J and M nonimmigrants, unlike most other nonimmigrants, are admitted to a date uncertain (D/S, duration of status). Despite that difference between date certain and date uncertain - previously recognized by USCIS as a vitally significant trigger date for determining the onset of unlawful presence- the Service, for the first time, seeks to apply Congress' definition of unlawful presence to nonimmigrants who have not been admitted to a date certain and/or who may not have remained after the expiration of their programs.

Congress uses clear language in the Act to calibrate the onset of unlawful presence from after the expiration of the period of stay authorized by (DHS). Now, the Service seeks to conflate a failure to maintain status *per se* with the accrual of unlawful presence rather than with overstaying the authorized period of stay. So, for instance, an F-1 student who timely departs the United States after the completion of his/her program, who was never "present in the United States after the expiration of the period of stay authorized by (DHS)" can be found to have accrued unlawful presence because of an earlier status violation such as having failed in one semester to carry a full course load.

This new policy violates the clear language of the Act at 212(a)(9)(B)(ii) and Congressional intent. The Service seeks to amend the clear language of the Act without Congressional action.

The Service acts here *ultra vires*.

2. The new policy violates the requirements of due process, clarity and fairness

The penalties for remaining in the United States after the expiration of the period of stay authorized by the (DHS) are severe. Overstaying the date certain for departure by 180 days can result in a bar to re-entry to the United States of 3 years. Overstaying by 1 year can result in a bar to re-entry of 10 years.

Persons who would suffer these severe penalties deserve the clarity and fairness of a rule of law, which permits them to comport their behavior with that which the law demands. The Service has historically understood this. As summarized by the Service in this May 10, 2018 Policy Memorandum, the Service's previous policy was dramatically different:

"...foreign students and exchange visitors (F and J nonimmigrants, respectively) who were admitted for, or present in the United States in, duration of status (D/S) started accruing unlawful presence on the day after USCIS formally found a nonimmigrant status violation while adjudicating a request for another immigration benefit or on the day after an immigration judge ordered the applicant excluded, deported, or removed (whether or not the decision is appealed), whichever came first. F and J nonimmigrants, and foreign vocational students (M nonimmigrants), who were admitted until a specific date (date certain) accrued unlawful presence on the day after their Form I-94 expired, on the day after USCIS formerly found a nonimmigrant status violation while adjudicating a request for another immigration benefit, or on the day after an immigration judge ordered the applicant excluded, deported, or removed (whether or not the decision was appealed), whichever came first." At Page 1.

Therefore, except for F, J or M nonimmigrants admitted to a date certain - which is very rare - unlawful presence for an F, J or M nonimmigrant with a D/S entry was not triggered by an 'overstay'. The unlawful presence clock was triggered by the finding of an officer or judge that the individual had

violated status; subsequently, nonimmigrant received a dated notice of the violation in writing, the foreign national was ordered to depart by a date certain and was warned that failure to depart by that date would trigger the accrual of unlawful presence time. In compliance with Section 212(a)(9)(B)(ii) of the Act, this procedure set a date certain for departure; notice was in writing and was subject to review via motion or appeal.

The new policy offers none of these due process protections.

An individual may be found years after an event to have violated status, thus to be found barred from re-entry. The clock may have begun to run without the individual's knowledge – as well as the sponsoring F and J institution - and the alleged violation of status may also have been unknowing. The date of the alleged violation may be difficult if not impossible to determine. The date certain after which the unlawful presence bar will attach may be anything but certain. Evidence and witnesses in rebuttal may have become unavailable with the passage of time.

The new policy is fundamentally unfair.

3. The new policy will discourage valid applications to 'seek reinstatement'

A student who violates status, particularly if done so innocently or through no fault of his/her own, may, in some cases, seek reinstatement from the Service. See: 8 C.F.R. § 214.2(f)(16) The Service often takes 10 to 14 months to adjudicate these applications. Even when filing a timely, non-frivolous application for reinstatement, the student - not knowing if the application will be granted or denied - will now have to balance the possibility of reinstatement with the risk of denial and the ensuing, new, added danger of the imposition of the 3/10 year bar to admissibility, retroactive to the date of the status violation.

This seems like an unlawful burden on the student's right to seek reinstatement. At a minimum, in such cases, the Service policy should withhold the start of the unlawful presence clock until a decision by DHS or an Immigration Judge on the merits.

4. The new policy must be put into effect via 'notice and comment' rulemaking pursuant to the Administrative Procedures Act

Section 214(a)(1) of the Immigration and Nationality Act states the "(a)dmision to the United States of any alien as a nonimmigrant shall be for such time and under such conditions as (DHS) may by regulations prescribe...". In compliance with this Congressional mandate, it is impermissible for the Service, other than by regulation, to create substantially new and significant 'conditions' under which an F, J, or M nonimmigrant may be admitted to or remain in the U.S. The Service must comply with the Immigration and Nationality Act and the Administrative Procedures Act.

These legal concerns have real impact for University F and J program sponsors, who are charged by SEVP as compliance administrator and adviser to these nonimmigrants. The following substantive institutional liability and risk management concerns flow from the legal ramifications of the policy change:

1. Absent an unlawful presence finding by DHS or an Immigration Judge that the F or J individual has violated status, Universities who sponsor F and J nonimmigrants will - *de facto* - become charged with this legal task.

This creates immense risk and liability to institutions of higher education as fact finder and arbitrator of how a potential violation of status may turn duration of status (D/S) into unlawful presence with a bar to

re-entry. The University's five certified Primary Designated Student Officials (PDSO) and designated Responsible Officers (RO) and staff are not equipped to make such critical, legal determinations, which have always been the purview of the Department of Homeland Security or Department of Justice.

F and J program sponsors have received no guidance or training from DOS or DHS (USCIS, SEVP, etc.) on how to make these complex and legal findings. Even with training and guidance, University program sponsors do not, and will not, have access to the F and J nonimmigrant's complete immigration history, which is essential to a legal determination of unlawful presence. SEVIS access to historical data in F and J status is limited to the sponsoring institution, meaning no access to SEVIS data transferred from another school. The simple fact is that University F and J program sponsors are not the personal immigration attorney of the nonimmigrant; rather their compliance obligation is to SEVP. There is an inherent conflict of interest in placing F and J program sponsors in the position to be collector of facts and arbitrator of a finding of unlawful presence to the F or J beneficiary. This is a complex legal finding with dire and long-term consequence to the F and J nonimmigrant. Without a clear ruling by DHS or an Immigration Judge, F and J nonimmigrants will rely on the University to provide legal advice on this matter, thereby opening to University to legal exposure.

2. Absent a dated notice issued by DHS or an Immigration Judge specifying when unlawful presence clock is triggered, F and J program sponsors will – *de facto* – become charged with this legal task.

Under the current practice, the nonimmigrant receives a dated notice of the violation of status in writing and the clock is triggered on the day after the date of the notice. The current practice provides certainty and clarity around the important determination of accrued unlawful presence time and whether a 3 or 10 year bar will attach, or because of the retroactive nature of the new policy, has already attached. The new policy places numerous liabilities on F and J program sponsors in "helping" the nonimmigrant make these determinations in order to take corrective action or otherwise cure the status deficiency. As with #1 above, PSDOs, ROs and their respective DSOs and AROs are not equipped to execute this legal function and any errors in judgement, process, or communication will place our University at risk of failure to properly administer the program as well as potential claims by the nonimmigrant against the University.

3. The retroactive nature of the policy creates institutional liability that can occur at any time and continue without end.

Absent a finding of unlawful presence by DHS or an Immigration Judge legally creating a "date certain" for triggering unlawful presence, any F and J nonimmigrant may come to the University in initial status or as a transfer and, wittingly or unwittingly, bring with them possible unlawful presence. Further, any action by the nonimmigrant that may, wittingly or unwittingly, have caused them to temporarily fall out of status during their time at the University will forever bind the University to unlawful presence, whether at the time known to the University or not. The combination of uncertainty in whether unlawful presence has attached, lack of clarity around when the clock starts, and retroactive nature of the new policy will mean that the University will be subject to liability and risk no matter what. Any attempt to "help" the nonimmigrant identify an unlawful presence event and count accrued time could make the University liable. In the alternative, if the University does not weight in on these legal matters, it could also be held liable for failure to properly advise the nonimmigrant and adequately comply with SEVP program requirements.

4. The unlawful presence policy will fundamentally change the nature of higher education compliance as SEVP program sponsors and advising to F and J nonimmigrants.

The dedicated (P)DSOs and (A)ROs at all 5 UMass campuses take immigration compliance and their related advising duties seriously. Their inherent relationship with SEVP Field Representatives and with F

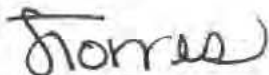
International Students and J Exchange Visitors must operate within an environment of candor and trust. The new unlawful presence policy erodes such trust and creates the setting that all F and J nonimmigrants could be potential liabilities to the University if previous status violations, for whatever reason, were not disclosed or even known. Basic advisory functions around maintenance of status, international travel and reinstatement will become mired in institutional risk and liability if 3 and 10 bars to re-entry under unlawful presence become part of (P)DSOs and (A)ROs compliance and advising responsibilities. Such complex consequences will likely impact the University's ability to administer the program within current SEVP regulatory and compliance requirements.

In light of these significant concerns, the University favors the recommendations submitted by NAFSA: Association of International Educators on May 24, 2018. Namely that in lieu of implementing the policy described in the memo, the following happen:

- Leave in place the current policy, which has served for over 20 years. Neither DHS nor legacy INS ever published regulations to implement this important area of law. If the agency wishes to implement such drastic changes to longstanding common interpretation of the law, it must be done according to the Administrative Procedures Act (APP) and through notice and comment.
- Implementation of any unlawful presence policy change must be fully coordinated with relevant government stakeholders, such as the Department of State, including the Visa Office and the Bureau of Education and Cultural Affairs' Exchange Visitor Program, and other divisions of DHS, including Immigration and Customs Enforcement (ICE) and the Student and Exchange Visitors Program (SEVP), and Customs and Border Protection (CBP).
- Exclude from unlawful presence count any status violations that occurred under color of law, where the student or exchange visitor reasonably relied on authorizations granted. For example, curricular or optional practical training authorized by SEVIS, or admission by CBP, or any number of agency actions that DHS later determines may have been improperly given should not start the unlawful presence clock until DHS or an Immigration Judge makes a formal status determination.
- Apply the change of status/extension of stay tolling rule to reinstatement applications.
- Expand the sections describing where F, J, and M nonimmigrants "do not accrue unlawful presence in certain situations." [draft Adjudicator's Field Manual 40.9.2(b)(1)(E)(iii)].

As you review the comments submitted, I trust you will incorporate stakeholder concerns into consideration to ensure that American universities, major F and J constituents, are not negatively impacted by the new policy memorandum.

Thank you for your attention and consideration to these issues.



Sandra E. Torres
Associate Counsel, Immigration and International Services
Office of the General Counsel
University of Massachusetts

June 8, 2018

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of the Director
20 Massachusetts Avenue, NW
Washington, DC 20529-2140

Submitted via email: publicengagementfeedback@uscis.dhs.gov

Re: USCIS Policy Memorandum: Accrual of Unlawful Presence and F, J, and M Nonimmigrants

Dear Madam or Sir:

I am writing to express my opposition and concerns regarding the new policy memorandum, "Accrual of Unlawful Presence and F, J, and M Nonimmigrants," posted by U.S. Citizenship and Immigration Services (USCIS) on May 11, 2018.

Briefly stated, the new memorandum will reverse more than 20 years of USCIS practice regarding the accrual of "unlawful presence," a legal term defined under section 212(a)(9)(B)(ii) of the Immigration and Nationality Act (INA) by reference to an individual who "is present in the United States after expiration of the period of stay authorized by the Attorney General or is present in the United States without being admitted or paroled." For nonimmigrant students and exchange visitors in the F, J, and M categories, legacy Immigration and Naturalization Service (INS) and USCIS have interpreted the statutory unlawful presence provisions to require notice to the individual of a status violation prior to the commencement of the unlawful presence clock. Such notice is provided in the context of the adjudication of a request for an immigration benefit by USCIS or a determination of a status violation by an immigration judge. The USCIS guidance articulating this position states, "It must be emphasized that the accrual of unlawful presence neither begins on the date that a status violation occurs, nor on the day on which removal proceedings are initiated."¹ This longstanding policy provides certainty in determining when unlawful presence begins to accrue, which the new policy does not.

As described in the May 11, 2018 memorandum, USCIS will now deem unlawful presence to have started accruing as of the day after the date that a status violation occurs, thus removing the critical procedural safeguard of providing notice to affected individuals that may find themselves subject to the three- and ten-year bars to admissibility. This raises serious questions regarding fundamental fairness and due process and will have a significant negative impact on the student, vocational, and exchange visitor communities.

¹ See USCIS Memorandum, Consolidation of Guidance Concerning Unlawful Presence for Purposes of Sections 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I) of the Act," (May 6, 2009), available at <http://www.aila.org/infonet/uscis-consolidation-guidance-unlawful-presence>.

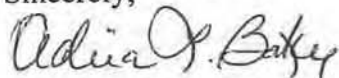
In recognition of the fluidity of academic programs, F, M, and J nonimmigrants are not admitted to the U.S. until a date-certain. Instead, they are admitted for the "duration of their status," or "D/S," which means the student or exchange visitor can remain in the United States as long as they maintain their nonimmigrant status. This generally means the student must maintain a full course of study or remain in the exchange program, not engage in unauthorized employment or other unauthorized activities, and complete the academic or exchange program in a timely manner or obtain an extension. What the new memorandum fails to recognize is that the question as to whether an individual has violated their nonimmigrant status is complex and nuanced. Students and exchange visitors can accidentally and unknowingly violate their status by dropping slightly below a full course of study, or by engaging in innocent, but unauthorized activity. For example, F-1 students are permitted to engage in work at a "qualifying on-campus job" for up to 20 hours per week while school is in session. Therefore, an F-1 student who inadvertently exceeds the 20-hour limit by just a couple of hours has technically violated his or her student status. In addition, a Designated School Official may make a good faith error in advising a student by authorizing a reduced course load that should not have been approved, thereby leading the student to unknowingly and unintentionally violate their status. This unfairness is compounded when the status violation also serves as the "trigger" for the accrual of unlawful presence by dependents of students and exchange visitors.

We are constantly reviewing the regulations to insure that the "grey areas" in the law, which are not covered by the regulations, are met in every way. Designated School Officials pour over the regulations, contact the government agencies, and oftentimes get conflicting responses. We believe that a student could accrue unlawful presence inadvertently at no fault of the student. The price they would pay for the inconsistency would be much too high for the realities that happen in real life, and with serious students, scholars and colleges/universities.

The students and scholars are tracked daily via the SEVIS system, and the seriousness of their study or research program is detailed, tracked and reported constantly for all of the students and scholars.

USCIS states that the purpose of the new guidance is to "reduce the number of overstays" and "to improve how USCIS implements the unlawful presence ground of inadmissibility." Unfortunately, this approach accomplishes neither of these goals and will instead unfairly punish a potentially significant portion of the student and exchange visitor population, further erode foreign student enrollments at U.S. colleges and universities, and unnecessarily damage the U.S. economy. I urge USCIS to abandon this misguided directive and to maintain the unlawful presence guidance that has been in place for decades and ensures that fundamental fairness is a critical component in interpreting and implementing the unlawful presence statute.

Sincerely,



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The Teaching Assistants Association at the University of Wisconsin-Madison expresses its deepest concern for the recent changes proposed by U.S. Citizenship and Immigration Services on the conditions in which international students in the U.S can accrue "unlawful presence". The proposed changes would create unnecessary burden on international students, their peers, and the academic community as a whole.

Under the current policy, international students can accrue "unlawful presence" in the U.S. after they are found to have violated the terms of their visa. After 180 days of "unlawful presence", they can be barred from returning to the U.S. for up to 10 years. The proposed changes would declare an international student as "unlawfully present" in the country from the moment they are said to have violated the terms of their visa, even if they do it unknowingly and are not notified. This change generates deep concern in terms of students' rights to be informed, understand, and contest any allegations. This situation creates great uncertainty that can harm not only international students at UW-Madison, but also the larger university community.

International students are key members of our community. Research, learning and teaching projects require a diversity of perspectives, experiences, and the labor of international students. All undergraduate students benefit when they learn with and are taught by their international peers. As equal members of the UW-Madison community, we believe that international students deserve stability and certainty regarding their visa status. The uncertainty introduced by the proposed policy change would harm the advancement of university projects, stifle innovation, and impede instruction goals at UW-Madison.

By limiting the possibility to contest alleged violations of visa status, the proposed policy change would add considerable legal burden and emotional vulnerability for international students. Furthermore, the changes would disproportionately affect lower income students who lack access to legal counsel. This policy further disadvantages these students who already face severe limitations to obtaining an education.

We believe that all students, regardless of their country of origin and economic means, should have the right to complete their studies and participate in innovation and instruction at UW-Madison. The TAA stands in solidarity with international students to advance education, research, and teaching in a dignified and free environment.

The Executive Board

June 8, 2018

Mr. L. Francis Cissna, Director
U.S. Citizenship & Immigration Services
Department of Homeland Security
20 Massachusetts Avenue, NW
Washington, DC 20529

RE: Accrual of Unlawful Presence and F, J, and M Nonimmigrants Policy Memo

Dear Director Cissna,

I am writing to express my concern with the proposed changes outlined in the Unlawful Presence memorandum as they apply to F-1 and J-1 students. Based on more than 30 years advising international students as a Principal Designated Official, I strongly believe these changes are an abrupt change to more than 20 years of policy guidance.

International students are a viable and valuable part of the U.S. economy. In the latest Open Doors report, approximately 1,078,822 international students are currently in the U.S. and their economic value is \$36.9 billion. Many U.S. universities and college rely on the tuition fees international students bring to their campuses. These changes make the U.S. a less attractive place for international students to choose to study. Already, U.S. universities are losing the international students who will return home to become advocates of the U.S. to other countries such as China, Australia, Canada and the UK.

International students do not deserve the added anxiety this will cause them regarding their immigration status. Already international students have great anxiety regarding their immigration status. They send thousands of dollars to scam callers who claim to be immigration officers, they worry that forgetting to extend their I-20 will lead to deportation. They should be allowed to complete their studies as do American students without this additional worry.

The proposed change is complex and will be difficult to put into operation. Numerous scenarios will come into play that will lead to wrongly identifying international students as failing to maintain their lawful status. It will add pressure for USCIS to more quickly to adjudicate F-1 student applications for change of status or OPT which will add to the mistakes already made on these applications on a daily basis. A mistyped OPT date, an incorrect name or birthdate, common mistakes now, could lead to unfairly subjecting international students to the 3 year or 10 year bar to re-entry to the U.S. Other applications, such as reinstatement to F-1 status, now has an adjudication delay of 4-5 months, and if the application is denied the 3 year bar will already have begun and is even more unfair to the student than the adjudication delay.

Further operational roadblocks will appear. Currently F-1 students leaving the U.S. do not meet with an immigration officer. At the airports, they check out but how long does it take the airlines to process their departure. At the land borders, international students walk into Mexico or Canada without seeing anyone, and if Customs and Border Protection officers are taken from meeting the persons coming into the U.S the waits at the borders will increase tenfold. And many students only cross the border into Mexico or Canada to shop, eat or enjoy an evening in these countries. I wonder whether the officers will have time to differentiate between those exiting the U.S. for the evening or forever.

Additionally, I-20 forms which are the basis of international students' D/S status in the U.S., are first issued for an estimated period of time for students to complete their program of study. Students may finish their studies before the end date on their I-20 and believe they are eligible to remain in the U.S. If unlawful presence kicks in, they are in danger of being barred from the country where they lived as students for 4-5 years.

I remember the fear that the unlawful presence regulation caused international educators when it was first enacted in the 1990's. But then knowing that a definite decision had to be made before it went into effect, lessened our fears. Leave the current policy as it has been for over the last 20 years. Do not use international students as a scapegoat to assist the current administration into believing it is making America safer.

Thank you for the opportunity to comment.

Sincerely,



Jane C. Kalionzes

Principal Designated School Official

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DHS Overestimates Visa Overstays for 2016; Overstay Population Growth Near Zero During the Year

Robert Warren
Center for Migration Studies

Executive Summary

For years, noncitizens who fail to abide by the terms of their nonimmigrant (temporary) visas were not widely recognized as major contributors to the US undocumented population. Yet since 2005, the ratio of overstays to illegal entries across the border has increased rapidly as the number of border crossings dropped to 1970s levels. As a result, the inflow of overstays has exceeded border crossers for nearly a decade. These developments highlight the importance of accurate and timely estimates of overstays.

In 2017, the US Department of Homeland Security (DHS) released a report, *Fiscal Year 2016 Entry/Exit Overstay Report*, showing estimates of overstays, by country, for the 50.4 million nonimmigrants admitted in fiscal year 2016 (DHS 2017). At the end of the fiscal year, DHS had not verified the departure of 628,799 nonimmigrants.¹

The Center for Migration Studies (CMS) compared the DHS overstay estimates to CMS's estimates of the number of undocumented residents that arrived in the past few years. Data were available to make the comparisons for 133 countries; these countries account for 99 percent of all overstays. The major findings include the following:

- For 90 of the 133 countries, the DHS and CMS estimates differ by less than 2,000, and the correlation between the estimates for those 90 countries is .97, which indicates a very close mutual relationship.
- The DHS estimates of overstays for Canada are far too high.
- The DHS estimates greatly exceed the CMS estimates for about 30 countries, half of them participants in the US Visa Waiver Program (VWP).²

1 The 628,799 figure refers to nonimmigrants that arrived in 2016 and whose departure had not been verified by the end of 2016. Thus, as demonstrated in this paper, it includes nonimmigrant admissions whose departure was not verified *and* actual overstays.

2 The US Visa Waiver Program (VWP) is described at <https://www.dhs.gov/visa-waiver-program>, as follows: "The VWP, which is administered by the Department of Homeland Security (DHS) in consultation with the State Department, permits citizens of 38 countries to travel to the United States for business or tourism for stays of up to 90 days without a visa. In return, those 38 countries must permit US citizens and nationals to travel to their countries for a similar length of time without a visa for business or tourism purposes."

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- Slightly more than *half* of the 628,799 reported to be overstays by DHS actually left the country but their departures were not recorded.
- After adjusting the DHS estimates to take account of unrecorded departures, as well as departures in 2016 of overstays that lived here in 2015, overstay population growth was near zero in 2016.
- Thus, while overstays account for a large percentage of the newly undocumented, they represent less than half (44 percent) of the overall undocumented population, and they are less likely than illegal border crossers to be long-term residents.
- The country-specific figures shown here should help DHS focus its efforts on improving the verification of departures of temporary visitors.
- Finally, these comparisons indicate that the DHS estimates do not provide a sound basis for making decisions about admission to, or continuation in, the VWP.

Introduction

Since 2008, the primary mode of entering the undocumented population in the United States has been to arrive legally (after screening) on nonimmigrant (temporary) visas, and then overstay the period of admission or otherwise violate the terms of the visas (Warren and Kerwin 2017). Before 2008, far more arrived illegally across the southern border (entry without inspection, EWI) than overstayed. The reversal in these two modes of entry did not occur because overstays increased but because the annual number of EWIs dropped sharply from 2000 to 2015, reaching historically low levels in the past few years (Warren 2017).

The issue of overstays has become increasingly important in discussions of immigration policy in the past two years. A recent Center for Migration Studies (CMS) report noted: “The striking change in the mode of arrival after 2005 raises important policy questions not just about the need for a 2,000-mile wall, but about the allocation of immigration enforcement resources and funding levels for border enforcement compared to other strategies that might reduce new arrivals into the undocumented population and strategies to reduce the overall size of this population” (Warren and Kerwin 2017).

Despite the increasing recognition of the importance of overstays, official statistics on this phenomenon have not been available until recently. The newest US Department of Homeland Security (DHS) estimates of overstays, released in 2017, are in the *Fiscal Year 2016 Entry/Exit Overstay Report*.³ The report “provides data on departures and overstays, by country, for foreign visitors to the United States who entered as nonimmigrant visitors through an air or sea Port of Entry (POE) and who were expected to depart in FY 2016 (October 1, 2015 - September 30, 2016)” (DHS 2017). The DHS procedures used to

3 US Department of Homeland Security (DHS) reporting requirements for overstays are set forth in Section 2(a) of the Immigration and Naturalization Service Data Management Improvement Act of 2000 (Pub. L. No. 106-215, 114 Stat. 337 [2000]), House Report 114-668, and Senate Report 114-264.

estimate overstay is described in detail in the report. The DHS statistics evaluated here are the sum of the figures shown in the “Suspected In-Country Overstays” column in tables B through F.

This report assesses the credibility of the 2016 DHS estimates for 133 countries by comparing them to estimates for comparable countries derived by CMS. The CMS estimates are based on statistics on the foreign-born population collected in the Census Bureau’s American Community Survey (ACS), as described in detail in Warren (2014). A summary of the estimation procedure is presented in the Appendix. Essentially, the CMS estimates for the 133 countries are the number of undocumented residents that arrived in approximately 2013⁴ and were counted in 2014 and 2015.

Strictly speaking, neither the DHS nor CMS estimates actually are estimates of overstay. The DHS figures represent actual overstay plus arrivals whose departure could not be verified. That is, they include both actual overstay and unrecorded departures. The CMS estimates are for *net* arrivals in recent years. They include overstay *minus* those who overstayed and then left⁵ the overstay population. In addition, the CMS estimates are subject to sampling variability and other possible errors. Despite these differences, the information shown in the three tables below make it apparent that, even with these potential differences, useful information can be derived by comparing the two sets of data.

Comparison of DHS and CMS Estimates

The similarity of the estimates for many countries as well as the correlation of .97 between the two sets of estimates in Table 1 show that, even with the caveats above, the DHS and CMS estimates measure approximately the same population. The “2,000 difference” standard used to distinguish the nations in the three tables is arbitrary; however, given the fundamental differences in the underlying data, it is remarkable that the results are within plus or minus 2,000 for 90 of the 133 countries evaluated in this report. In fact, the reasonably close correspondence between the two sets of estimates in Table 1 greatly increases confidence in the significant findings in Table 2.

4 The gap of roughly one year or so between arrival (approximately 2013) and being counted (average of the 2014 and 2015 estimates) means that some overstay would have left the population. On the other hand, it is likely that some overstay would have been added to the population (for example, if they were in status for a year or more and then overstayed). The similarity of the DHS and Center for Migration Studies (CMS) estimates for the 92 countries in Table 1 suggests that the departures and additions tended to cancel each other.

5 Overstay can leave the population in four ways: emigrate voluntarily, adjust to lawful status, be removed by DHS, or (a relatively small number) die. Also, nonimmigrants can enter the overstay population after being in the United States for more than a year, for example by working without authorization or remaining in the United States after attending college.

Table 1. Countries with Less Than 2,000 Difference between CMS and DHS Estimates of Nonimmigrant Overstays*Correlation, these 90 countries = .97*

Country	CMS	DHS	Country	CMS	DHS
These 90 countries	86,500	109,900			
Afghanistan	1,400	500	Honduras	4,800	5,600
Albania	1,000	500	Hungary**	300	1,900
Algeria	400	400	Iceland**	z	200
Antigua-Barbuda	100	200	Indonesia	600	1,700
Armenia	400	300	Iran	1,600	900
Azerbaijan	100	300	Iraq	z	1,200
Barbados	100	1,600	Kazakhstan	500	800
Belarus	500	700	Kenya	2,500	1,100
Belgium**	100	1,400	Kuwait	200	1,000
Belize	300	600	Laos	500	300
Bhutan	1,200	100	Latvia**	z	300
Bolivia	200	1,200	Lebanon	700	1,000
Bosnia	300	300	Liberia	800	800
Bulgaria	300	800	Libya	300	400
Cambodia	600	200	Lithuania**	200	500
Cameroon	1,100	1,200	Macedonia	700	400
Cape Verde	600	900	Malaysia	800	1,600
China	24,300	25,500	Micronesia	400	z
Congo	1,100	800	Moldavia	400	1,000
Costa Rica	1,000	2,700	Montenegro	100	300
Croatia	100	300	Morocco	500	800
Cyprus	z	100	New Zealand**	z	1,600
Czech Republic**	100	1,000	Nicaragua	1,400	1,400
Denmark**	z	1,600	Norway**	100	1,100
Dominica	400	300	Pakistan	4,500	3,000
Egypt	3,000	2,100	Panama	200	900
Eritrea	800	600	Paraguay	100	400
Fiji	300	300	Romania	700	1,500
Finland**	z	700	Saint Lucia	200	400
Gambia	100	200	Saint Vincent	z	400
Georgia	200	1,100	Senegal	400	400
Ghana	3,100	1,200	Serbia	500	1,200
Greece**	400	1,300	Sierra Leone	1,200	200
Grenada	100	300	Singapore**	100	600
Guatemala	5,800	6,600	Slovakia**	400	800
Guinea	100	300	Somalia	z	z
Guyana	1,700	1,900	South Africa	600	1,200

** denotes Visa Waiver country.

z indicates zero or rounds to zero.

Table 1. Countries with Less Than 2,000 Difference between CMS and DHS Estimates of Nonimmigrant Overstays – *continued**Correlation, these 90 countries = .97*

Country	CMS	DHS	Country	CMS	DHS
Sri Lanka	200	500	Trinidad and Tobago	600	1,000
Sudan	800	400	Uganda	300	500
Syria	1,100	900	United Arab Emirates	100	500
Taiwan**	900	2,000	Uruguay	100	1,400
Tanzania	100	300	Uzbekistan	1,000	900
Thailand	3,000	3,200	Yemen	300	300
Togo	200	300	Zambia	100	200
Tonga	100	300	Zimbabwe	z	200

** denotes Visa Waiver country.

z indicates zero or rounds to zero.

Source: CMS estimates of undocumented residents in 2014 and 2015 by year of arrival; DHS estimates (sum of all categories) shown in DHS (2017).

Table 2 shows comparisons for the 36 countries in which the DHS estimates exceeded the CMS estimates by 2,000 or more. For the non-Visa Waiver Program (VWP) countries in the left panel of Table 2, the country that stands out the most is Canada: 119,400 DHS overstays compared to only 900 new arrivals in the undocumented population. Other notable differences in the left panel are Brazil (39,100 vs. 4,900), Colombia (19,600 vs. 6,000), Nigeria (13,800 vs. 4,000), and Venezuela (23,900 vs. 5,300).

Even though they differ by more than 2,000, the DHS and CMS estimates for four relatively large sending countries in Table 2 are fairly close: Mexico (46,700 vs. 42,100);⁶ India (24,400 vs. 18,800); Dominican Republic (10,400 vs. 7,500); and Korea (7,000 vs. 4,400).

The largest differences in Table 2, and possibly the most significant from a policy perspective, are for the VWP countries in the right panel. With the exception of Korea, as noted, all of the DHS estimates for VWP countries shown in Table 2 greatly exaggerate the number of overstays. In fact, excluding Korea, total DHS overstays in the right panel of Table 2 outnumber the CMS estimates by 115,800 to 4,200. For nine VWP countries — Australia, Austria, France, Germany, Italy, Netherlands, Sweden, Switzerland, and the United Kingdom — the DHS estimates of overstays in just one year, 2016, are higher than the CMS estimates of the *total* undocumented population from each of those countries in 2015.

⁶ The CMS estimate of overstays in 2016 is based partly on DHS estimates of overstays from Mexico in 2015. Thus, it is not surprising that the CMS and DHS estimates for Mexico are reasonably close in 2016.

Table 2. Countries in Which the DHS Estimate Exceeds the CMS Estimate of Nonimmigrant Overstays by 2,000 or More

Country	CMS	DHS	Country	CMS	DHS
All 36 countries	120,700	484,900			
<u>Non-VWP</u>	<u>112,100</u>	<u>362,100</u>	<u>VWP countries</u>	<u>8,600</u>	<u>122,800</u>
Argentina	900	7,000	Australia**	100	7,000
Bahamas	400	4,000	Austria**	z	2,900
Brazil	4,900	39,100	Chile**	600	5,600
Canada	900	119,400	France**	200	11,000
Colombia	6,000	19,600	Germany**	500	19,500
Dom. Rep.	7,500	10,400	Ireland**	100	2,400
Ecuador	4,500	7,600	Italy**	500	15,300
El Salvador	2,900	5,100	Japan**	400	5,400
India	18,800	24,400	Korea**	4,400	7,000
Israel	100	3,900	Netherlands**	z	4,300
Jamaica	5,300	10,800	Portugal**	400	3,500
Jordan	100	2,600	Spain**	800	12,100
Mexico	42,100	46,700	Sweden**	100	2,800
Nigeria	4,000	13,800	Switzerland**	z	2,300
Peru	3,900	6,000	UK**	500	21,700
Poland	1,000	3,000			
Russia	1,600	4,200			
Saudi Arabia	400	3,100			
Turkey	200	3,300			
Ukraine	1,300	4,200			
Venezuela	5,300	23,900			

** denotes Visa Waiver country

z indicates zero or rounds to zero.

Source: CMS estimates of undocumented residents in 2014 and 2015 by year of arrival; DHS estimates (sum of all categories) shown in DHS (2017).

The CMS estimate exceeds the DHS estimate of overstays by 2,000 or more in only seven countries (Table 3). In general, we would expect the DHS estimates to be higher because they include unverified departures as well as actual overstays. Some of the differences — especially those for Bangladesh, Burma, Ethiopia, Haiti, and Nepal — might be explained by sampling variability or other errors in the CMS data. However, the CMS estimates for the Philippines and Vietnam appear to be too high. The data and assumptions that CMS used to derive estimates for those two countries should be reexamined. The outcome of that review will not affect the findings presented here because the overall assessment of the DHS estimates is based on the figures shown in Tables 1 and 2.

Table 3. Countries in Which the CMS Estimate Exceeds the DHS Estimate of Nonimmigrant Overstays by 2,000 or More

Country	CMS	DHS	Country	CMS	DHS
All 7 countries	52,000	25,500	Haiti	8,100	5,700
Bangladesh	3,600	1,500	Nepal	4,900	1,500
Burma	2,600	300	Philippines	17,200	10,800
Ethiopia	4,100	1,000	Vietnam	11,500	4,700

Source: CMS estimates of undocumented residents in 2014 and 2015 by year of arrival; DHS estimates (sum of all categories) shown in DHS (2017).

Discussion

The CMS estimates shown here are the only data that are sufficiently detailed and precise to evaluate the country-by-country overstay numbers reported by DHS. Even with the differences in the two data sets, the comparability of the estimates for 90 countries shown in Table 1 indicate that the two sets of estimates measure approximately the same population.

The figures presented above show that overstays are significantly overestimated for more than 30 countries in the 2016 DHS report, and half of those are VWP countries. In addition to assessing the DHS estimates for individual countries, the estimates in Tables 1 and 2 provide a basis for assessing the accuracy of DHS's *total* of 628,799 overstays reported for 2016. In Table 1, total DHS overstays are higher than the CMS estimates by about 23,000. In Table 2, the DHS total for the 36 countries is 485,000; the CMS total is 121,000. Increasing the CMS estimate by 50 percent (an extreme assumption) would raise the CMS total to 181,000. Thus, the DHS estimates shown in Table 2 are likely to be overstated by at least 300,000 (485,000 minus 181,000). Subtracting the total DHS overestimates in both tables would reduce the DHS total of 628,799 by 323,000. In other words, about 323,000, or slightly more than half, of the 628,799 reported to be overstays by DHS actually left the country but their departures were not recorded. The result is a revised total of about 306,000 estimated overstays in 2016.

It is important to keep the estimated 306,000 overstays in demographic perspective. Arrivals of overstays during the year do not represent undocumented population growth any more than births during the year represent total population growth. To estimate population change, those who were here at the beginning of the year, and left during the year, must be taken into account. Statistics reported by CMS⁷ indicate that about 5.7 percent left the overstay population annually from 2008 to 2015. At that rate, about 275,000 of the 4,830,000 overstays that resided here at the end of 2015 would have left during 2016. The net growth of about 31,000 (306,000 minus 275,000) in 2016 indicated by these estimates is subject to a considerable amount of error. However, the estimate is not far from the average net growth of 20,000 from 2008 to 2015 shown in Table 5 in the Appendix. In summary, the

⁷ The "statistics reported by CMS" in this paragraph primarily refer to the estimates in Table 5 of Warren (2017). For reference, Table 5 from that report is replicated at the end of the Appendix.

DHS estimate of overstays in 2016, reduced to account for unrecorded departures of those who arrived in 2016, as well as departures during 2016 of overstays that lived here in 2015, indicates that overstay population growth was near zero in 2016.

Conclusion

It is clear that the DHS estimates of overstays from Canada and from VWP countries that have very small undocumented populations, as well as the *total* number, erroneously include very large numbers of nonimmigrants that departed but their departure could not be verified. The country-specific figures shown in Table 2 should help DHS focus its efforts on improving the verification of departures of temporary visitors.

The findings reported here are important for at least two other reasons. First, the remarkably high, and erroneous, number of overstays reported by DHS for many VWP countries could lead to mistaken efforts to remove specific countries or to eliminate the program entirely. Second, the unsubstantiated report that more than 600,000 nonimmigrants overstayed in 2016 could revive fears that undocumented population growth has resumed or could lead to enforcement tactics or funding levels unjustified by the size of the overstay challenge. The best information available indicates that overstays from VWP countries remain at extremely low levels and that the total overstay population is growing very slowly.

The findings also add to a growing body of literature that argues for broad immigration reform. Since 2013, the Center for Migration Studies has released a dozen reports on the US undocumented population that demonstrate that:

- illegal entries to the United States fell dramatically between 2000 and 2015 (Warren 2017);
- given diminished illegal entries, the majority of new entries into the US undocumented population in recent years has come from nonimmigrants who overstayed or otherwise violated the terms of their temporary visas (Warren and Kerwin 2017); and
- most US undocumented residents have lived in the United States for long periods, have built strong equitable ties, and have contributed substantially to the country (Warren and Kerwin 2015, 98-100).
- Based on these trends, CMS has argued against the necessity of building a 2,000 mile border wall (Warren and Kerwin 2017). It has also presented several options for legalizing different groups of undocumented residents, and has argued that these options, combined with reform of the legal immigration system and immigration enforcement, would lead to a substantial, permanent reduction in the US undocumented population (Kerwin and Warren 2017, 320-23).

This paper finds that DHS has greatly overstated the number of noncitizens from roughly 30 countries who have overstayed their nonimmigrant (temporary) visas. In particular, the DHS estimates for 2016 include significant numbers of nonimmigrants that left the undocumented population, but whose departure could not be verified. Thus, the actual number of overstays in 2016 was about half of the number estimated by DHS. Accurately

recording the arrival and departure of more than 50 million temporary admissions each year is a monumental task. DHS deserves substantial praise for accounting for well over 99 percent of all departures.

These findings provide further evidence that the conditions for broad immigration reform — a robust immigration enforcement system, a legal immigration system that has not been overhauled in 52 years, and a large, long-term undocumented population — are firmly in place.

Appendix

A. Derivation of the CMS Estimates in This Report

Steps 1 to 5 below summarize the CMS methodology for deriving annual estimates of the undocumented population. Steps 6 and 7 describe how those estimates were used to compile the CMS estimates shown in Tables 1 to 3 above.

CMS used the procedures below (Steps 1 to 5) to derive estimates of the undocumented resident population in 2010. The same steps⁸ were followed to derive annual estimates for 2011 to 2015. The classification of noncitizens as undocumented residents was done at the microdata level. The CMS estimates shown here were compiled by country of origin and single year of entry from those data sets. Warren (2014) provides a detailed description of the methodology and compares the CMS estimates based on this methodology to estimates derived using the residual method.

Step 1. The first step in the estimation procedure was to compile data from the 2010 ACS for all noncitizens who entered the United States from 1982 to 2010. It was assumed that nearly all undocumented residents are in the category “noncitizens who entered the US after 1981.” Very few who entered before 1982 would still be residing here as undocumented residents in 2010.⁹

Step 2. A series of edits, referred to as “logical edits,”¹⁰ were used to identify and remove as many legal residents as possible based on responses in the survey.

Step 3. Separate population controls were estimated for 145 countries or areas for undocumented residents counted in the 2010 ACS. For each country or area, the ratio of the population control to the logically edited population (from Step 2) was computed.

8 The country-by-country selection ratios for 2010, computed in Step 3, were used in Step 4 for every year. Independent population controls were computed *only* for 2010.

9 A large percentage of those who entered before 1982 obtained legal status under the Immigration Reform and Control Act of 1986 (IRCA) and those who did not apply for legalization have had more than 25 years in which to leave the undocumented resident population — that is, to adjust to legal status, be removed, leave voluntarily, or die.

10 The term logical edit refers to the process of determining probable legal status by examining survey data; for example, respondents were assigned to the legal category if they worked in occupations that generally require legal status, had the characteristics of legal temporary migrants, were immediate relatives of US citizens, received public benefits restricted to legal residents, were from countries where most arrivals would be refugees, or were age 60 or older at entry.

Step 4. The country-by-country ratios derived in Step 3 were used to make final selections of individual respondents in the ACS to be classified as undocumented residents.

Step 5. The estimates of those counted in the ACS (from Step 4) were adjusted for undercount.

Step 6. The CMS estimates from Step 5 were first compiled by single year of entry. Then, for each of the 133 countries listed in Tables 1, 2, and 3, the average of the following five recent entry cohorts was computed: three entry cohorts (2012, 2013, and 2014) from the 2015 estimates, and two entry cohorts (2012 and 2013) from the 2014 estimates.

Step 7. Step 6 yields estimates of *total* undocumented arrivals; however, estimates of *overstay* arrivals were needed for the CMS data shown in Tables 1, 2, and 3. Total arrivals were converted to overstay arrivals using the percentages and procedures shown in Table A-1. That is, 34.7 percent of the total undocumented arrivals from Mexico (computed in Step 6) were estimated to be overstays.

Table A-1. Percent of Total Arrivals Estimated to be Overstays

Country	Percent
Mexico	34.7%
El Salvador	11.0%
Guatemala	24.9%
Honduras	20.4%
Nicaragua	56.3%
Dominican Republic	54.4%
All other countries	See below

Note: These percentages, along with the method of estimation, are shown in Warren and Kerwin (2017). See Table A-1 in that report.

Estimating overstays for each of the 127 countries not listed in Table A-1. The method of estimating illegal border crossers (EWIs) and overstays for each of the 127 countries that are not shown in Table A-1 has been updated and improved for these estimates. The first step was to estimate EWIs from each of these 127 countries. EWIs were estimated to be the *least* of (a) 5 percent of CMS's estimate of total arrivals from each of these countries, or (b) 25 percent of aliens apprehended by DHS for each of these countries in 2015.¹¹ The second step was to subtract EWIs from CMS's estimates of total entries for each country. Unrounded estimates were used to derive all of the figures shown in this report, and then the estimates for each country were rounded to hundreds.

The largest estimates of EWIs for the countries *not* listed in Table A-1 were: India (700), China (500), Brazil, Haiti, Jamaica, and Colombia (300 each), Ecuador and Peru (200 each), and 100 for 10 other countries. The estimates of EWIs for all other countries were less than 50.

¹¹ See Table 34 of the 2015 DHS Yearbook of Immigration Statistics.

B. Table Replicated from Warren (2017)

Table 5. Change in the Undocumented Population, 2008 to 2015, by Mode of Entry*Numbers in thousands, rounded independently.*

Mode of entry	2008 to 2015 period			Percent that		Average annual change
	Undoc. pop. in 2008 (1)	Net arrivals (2)	Left the undoc. pop.* (3)	Undoc. pop. in 2015 (4)	left the pop. from 2008 to 2015 (5)=(3)/(1)	
Total	11,460	3,095	3,510	11,045	31%	-60
EWIs	6,775	1,080	1,640	6,215	24%	-80
Overstays	4,690	2,015	1,870	4,830	40%	20
Percent overstays	41%	65%	53%	44%	-	-

Source: Center for Migration Studies. Columns 1 and 4, estimates derived by CMS. Column 3 = [population in 2008] - [population in 2015 that arrived before 2008]. Col. 2 = Col. 4 – Col. 1 + Col. 3.

* Undocumented residents can leave the population in four ways: emigrate voluntarily, adjust to lawful status, be removed by DHS, or (a relatively small number) die.

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THE NATIONAL FOUNDATION FOR AMERICAN POLICY

June 10, 2018

Mr. L. Francis Cissna
Director
U. S. Citizenship & Immigration Services
Department of Homeland Security
20 Massachusetts Avenue, NW
Washington, DC 20529

Dear Director Cissna:

To help you in formulating the best policy for the country, I have enclosed materials that respond to the May 10, 2018 U.S. Citizenship and Immigration Services (USCIS) policy memorandum on "Accrual of Unlawful Presence and F, J, and M Nonimmigrants."

The materials include two articles published on Forbes.com that discuss the policy. One contains an interview with Paul Virtue, who drafted the policy on unlawful presence when at INS that the new memorandum will overturn. Mr. Virtue makes several important points you should consider. The other article focuses on an analysis by noted demographer Robert Warren that questions the conclusions of the DHS "overstay" report that USCIS cites as a key justification for the new unlawful presence memo. I have also attached a copy of Mr. Warren's report.

Thank you.

Sincerely,

Stuart Anderson
Executive Director

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Forbes

June 1, 2018

USCIS Policy Change Could Bar Many International Students

By STUART ANDERSON

A new U.S. Citizenship and Immigration Services (USCIS) [memo](#), described as “an abrupt, radical departure from more than 20 years of policy guidance” by one education group, may result in many international students who unknowingly violate their immigration status from being barred from the United States for 10 years.

“There has always been a strict distinction between violating status and being unlawfully present in the United States,” notes immigration attorney [Cyrus Mehta](#). “One can be in violation of status without being unlawfully present. Even if an F, J and M student dropped out of school or engaged in unauthorized work, he or she would be considered to have been in violation of status but not accruing unlawful presence. This is because an F, M and J nonimmigrant is usually admitted for a Duration of Status (D/S) rather than up to a certain date.”

International educators are concerned the new USCIS policy on “Accrual of Unlawful Presence” will harm students. “The proposed change is operationally complex and may lead to wrongly identifying a large number of foreign students and exchange visitors as failing to maintain lawful status, thus unfairly subjecting them to the 3-year, 10-year, or permanent bars to re-entry to the United States,” wrote NAFSA: Association of International Educators in [comments](#) to USCIS on the new policy. “Like American students, international students should be allowed to complete their studies at their chosen institution, without the stress or fear of being deported based on an oversight of which they may not be aware.”

To better understand the policy change and its implications I interviewed [Paul Virtue](#), a partner at Mayer Brown. He wrote what is known as the “[Virtue memo](#),” in 1997, which established guidance for the Immigration and Naturalization Service on “unlawful presence.” That guidance has remained in force, but will be overturned, at least in part, on August 9, 2018, once the new USCIS policy memo goes into effect.

Stuart Anderson: What is “unlawful presence” and why does it matter?

Paul Virtue: In the 1996 Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), Congress created a new ground of inadmissibility for foreign nationals who had been unlawfully present in the United States for more than 180 days, but less than one year, and who had departed the country prior to the commencement of removal proceedings. Such an individual was deemed inadmissible to the United States for a period of three years. In addition, a foreign national who had been unlawfully present in the United States for one year or more and is again seeking admission is inadmissible for 10 years.

Under the statute, an alien is deemed to be unlawfully present in the United States if he or she remains after the expiration of his or her authorized period of stay or is present in the United States without having been admitted or paroled. The new ground of inadmissibility based on unlawful presence became known as the “3- and 10-year bars.” The new law became effective on April 1, 1997.

The new law took on added significance when a provision that had allowed people who were unlawfully present (but eligible for an immigrant visa) to adjust their status in the United States upon payment of a \$1,000 penalty lapsed on April 30, 2001. The repeal of section 245(i) of the Immigration and Nationality Act (INA) thus created a “Catch-22” situation for people who were otherwise eligible for permanent residence, but who could no longer adjust status in the United States and yet would trigger the 3- or 10-year bar by leaving and applying for an immigrant visa at a U.S. consulate outside the United States. The consequences are especially harsh for the beneficiaries of employment sponsorship who don’t have a US citizen or permanent resident spouse or parent to qualify for the “extreme hardship” waiver.

Anderson: What was the background that resulted in you drafting what is known as the “Virtue memo” back in 1997?

Virtue: In early 1997, I was appointed acting Executive Associate Commissioner for Programs of the Immigration and Naturalization Service (INS), with responsibility for implementing the new law. In a memorandum to INS adjudicators published on September 19, 1997, we set out our position on the interpretation of the term, “unlawfully present,” as that term related to nonimmigrants who had overstayed their authorized period of stay. (A *nonimmigrant* has permission to stay temporarily in the U.S.)

In the September 1997 memorandum we took the position that the expiration date of the nonimmigrant’s Arrival/Departure Record (Form I-94) represented the end of the authorized period of stay. Thus, a nonimmigrant was deemed to have commenced a period of unlawful presence on the earlier of the day following the expiration of the Form I-94 or the date of an official determination that the nonimmigrant had otherwise violated his or her status. Students (F-1 and M-1) and exchange visitors (J-1), however, were admitted not to a date certain but rather for the duration of their authorized academic, vocational or exchange program, respectively. Upon arrival, the student/exchange visitor was admitted for “duration of status” and their Forms I-94 were annotated “D/S.”

We considered changing the practice of admitting students and exchange visitors until a date certain, but the Inspections program (now U.S. Customs and Border Protection – CBP) balked at

that approach. Accordingly, for reasons of practicality and fundamental fairness, we took the position that a student or exchange visitor began to accrue unlawful presence only after an official determination had been made by INS or an immigration judge that the nonimmigrant has violated his or her status. The 1997 guidance as well as many other legacy INS policies were consolidated in the USCIS Adjudicators Field Manual (AFM) in May 2009.

Anderson: Can you explain the significance of the new USCIS memo on “Accrual of Unlawful Presence and F, J and M Nonimmigrants”?

Virtue: By memorandum dated May 10, 2018, U.S. Citizenship and Immigration Services announced a change, effective August 9, 2018, in the way it will calculate periods of unlawful presence in the United States for students and exchange visitors who remain beyond completion of their academic/training program.

Citing technological developments since 1997, that now allow for more precise tracking of compliance with academic and training programs, USCIS will rely on the information entered by the school/training sponsor in the Student and Exchange Visitor Information System (SEVIS) administered by Immigration and Customs Enforcement (ICE). The revisions will be reflected in Chapter 40 of the Adjudicators Field Manual. The agency has invited public comment for a 30-day period on this change.

We can expect to see substantial commentary from the academic community, which is largely responsible for the accuracy of the data contained in SEVIS. Concerns will likely include whether this new approach will provide the student/exchange visitor with definitive notice of a violation – and that he or she is accruing unlawful presence as a result of that violation. The new policy will take effect on August 9, 2018, which means that students and exchange visitors who for one reason or another have failed to maintain their status will begin to accrue unlawful presence, in some cases unbeknownst to them, on that date.

Anderson: What are the key differences between the memo you wrote in 1997 and the new USCIS memo?

Virtue: The key difference between the new policy and that established in September 1997 is that under the new policy the date on which a person begins to accrue unlawful presence is not tied to an official determination. Therefore, an individual may learn only *after the fact* that he or she has already accrued months of unlawful presence and is left with no recourse for avoiding the 3- and 10-year bars to admission. Moreover, under the new policy, the failure of the student or exchange visitor to maintain status results in a finding of unlawful presence for dependent family members over the age of 18 years. Therefore, the dependent family member can suffer significant consequences through no fault of his or her own.

Anderson: The recent DHS *Fiscal Year 2016 Entry/Exit Overstay Report* seems to conclude that anyone DHS cannot verify as having departed should be viewed as an “overstay,” at least for the purposes of the DHS report. Can you list some of the reasons why DHS might not be able to verify someone’s departure but the person may not have overstayed their time allowed in the U.S.?

Virtue: The DHS report on overstays is dependent on the accuracy of information in SEVIS and the agency's ability to match entry and exit information, especially for students who, for example, may have departed through a land port of entry or have had a change of status that was not updated in SEVIS. The system for matching data on change of status from the CLAIMS system administered by USCIS is not foolproof. Indeed, a biometric entry/exit system aims to improve the ability of DHS to identify overstays. While CBP's effort in this regard holds promise, it is not a finished product and there is still too much guesswork built into the DHS assumptions concerning the number of overstays among the student and exchange visitor populations.

Anderson: What do you think will be some of the potentially harmful consequences of the new USCIS memo on unlawful presence?

Virtue: My concern with the new approach is that it strays from the bright line we created in 1997. Under the new policy an adjudicating officer could make a determination that a prior minor infraction could have resulted in months or even years of unlawful presence having already been accrued, leaving the student or exchange visitor with no opportunity to cure the defect. It raises a question of fundamental fairness. The new policy recognizes that reinstatement in F-1 student status is fairly common. Accordingly, the policy provides that an F-1 student whose application for reinstatement is approved will not be considered to have accrued unlawful presence during the period the student was out of status.

Anderson: What do you believe is the right policy?

Virtue: The earlier policy put the foreign national on notice by virtue of an official determination that he or she had begun to accrue unlawful presence on a specific date. In my view fundamental fairness dictates such clear notice. For that reason, I believe the approach we took over 20 years ago was the right one.

Anderson: What advice would you give for individuals, universities and employers who could be affected by the new policy?

Virtue: We are advising our clients in student or exchange visitor status to pay careful attention to the information contained in their SEVIS records and to bring any discrepancies to the attention of their school/employer right away. We are advising universities and employers that their failure to maintain timely and accurate information in SEVIS will have significantly greater consequences after August 9, 2018.

Forbes

June 6, 2018

USCIS Uses Questionable 'Overstay' Report to Justify Policies

By STUART ANDERSON

On May 10, 2018, U.S. Citizenship and Immigration Services (USCIS) cited a Department of Homeland Security (DHS) report on "overstays" to justify a new, highly restrictive policy that may result in international students who unknowingly violate their immigration status being barred from the United States for 10 years. However, a noted demographer has examined the DHS report and found it so flawed that he concluded it should not be the basis for making immigration policy.

All sides of the immigration debate respect Robert Warren as a demographer. He authored the first government reports to determine the number of unauthorized immigrants in the United States and has continued to produce such estimates up to the present day. I met Robert Warren when we both worked at the Immigration and Naturalization Service (INS). He worked for many years at the U.S. Census Bureau and became the director of the INS's Statistics Division.

In January 2018, Warren published a study for the Center for Migration Studies, where he is a senior visiting fellow, that evaluated the Fiscal Year 2016 Entry/Exit Overstay Report released by the Department of Homeland Security (on May 22, 2017). Now that USCIS is using the DHS overstay report to justify a questionable policy, Warren's analysis deserves greater attention.

The heart of the matter is that the Department of Homeland Security's report includes as "overstays" people who did not necessarily overstay their visa, but individuals who DHS simply was unable to confirm had departed the United States. "The DHS figures represent actual overstays *plus arrivals whose departure could not be verified*," writes Warren. "That is, they include both actual overstays *and unrecorded departures*." (Emphasis added.)

There are a number of reasons why the Department of Homeland Security might be unable to verify a foreign national's departure in its system. "The DHS report on overstays is dependent on the accuracy of information in SEVIS (Student and Exchange Visitor Information System) and the agency's ability to match entry and exit information, especially for students who, for example, may have departed through a land port of entry or have had a change of status that was not updated in SEVIS," attorney Paul Virtue, a former top official at the Immigration and Naturalization Service, told me in an interview.

“The system for matching data on change of status from the CLAIMS system administered by USCIS is not foolproof,” explains Virtue. “While CBP’s [Customs and Border Protection] effort in this regard holds promise, it is not a finished product and there is still too much guesswork built into the DHS assumptions concerning the number of overstays among the student and exchange visitor populations.”

Demographer Robert Warren found a number of the estimates in the Department of Homeland Security’s overstay report to be implausible. “It is clear that the DHS estimates of overstays from Canada and from VWP [Visa Waiver Program] countries that have very small undocumented populations, as well as the *total* number, erroneously include very large numbers of nonimmigrants [individuals with temporary status] that departed but their departure could not be verified,” he writes. “Slightly more than *half* of the 628,799 reported to be overstays by DHS actually left the country but their departures were not recorded. After adjusting the DHS estimates to take account of unrecorded departures, as well as departures in 2016 of overstays that lived here in 2015, overstay population growth was near zero in 2016.”

Note this point: “Overstay population growth *was near zero in 2016*,” according to Warren. That is not the impression anyone would receive from reading the DHS report.

In sum, Warren notes, “This paper finds that DHS has greatly overstated the number of noncitizens from roughly 30 countries who have overstayed their nonimmigrant (temporary) visas. In particular, the DHS estimates for 2016 include significant numbers of nonimmigrants that left the undocumented population, but whose departure could not be verified. Thus, the actual number of overstays in 2016 was about half of the number estimated by DHS.”

The Center for Migration Studies report produced by Robert Warren reached two important conclusions: “First, the remarkably high, and erroneous, number of overstays reported by DHS for many Visa Waiver Program countries could lead to mistaken efforts to remove specific countries or to eliminate the program entirely. Second, the unsubstantiated report that more than 600,000 nonimmigrants overstayed in 2016 could revive fears that undocumented population growth has resumed or could lead to enforcement tactics or funding levels unjustified by the size of the overstay challenge.”

Given Robert Warren’s conclusion, it is remarkable USCIS cites the DHS overstay report to justify its new restrictive policy on unlawful presence. As noted, Warren’s analysis of the report concludes, “DHS has greatly overstated the number of noncitizens from roughly 30 countries who have overstayed their nonimmigrant (temporary) visas” and included “a remarkably high, and erroneous, number of overstays.”

The May 10, 2018 USCIS memorandum imposing controversial new rules on international students and exchange visitors states that it aims “to reduce the number of overstays” and offers proof of the need for the new policy by citing the DHS report’s finding that “the total overstay rate was 6.19 percent for F nonimmigrants.”

Here is the crux of the problem: There is an enormous amount of false precision contained in the DHS overstay report. More than half of the 6.19% “total overstay rate” for F-1 students in the

DHS report comes from “Suspected In-Country” overstays, which DHS itself defines as “possible overstays” that have “no records of a departure or change in status.” Even for those listed as “Out-of-Country” overstays, DHS can only offer “there is evidence indicating they are no longer physically present in the United States.”

In sum, we simply do not know to what extent the numbers in the DHS report represent shortcomings in data collection and government systems, rather than identifiable individuals who have overstayed their allowed time in the U.S. And DHS and USCIS do not know either. Moreover, the report does not differentiate between a possible short-term or inadvertent lapse in status vs. an individual who spends years in the U.S. out of legal status.

In its new memo, which takes affect August 9, 2018, USCIS seeks to punish any lapse of status – and to potentially bar international students from the country for a decade for such lapses. Under a 1996 law, if an individual is “unlawfully present” in the United States for one year, he or she can be inadmissible to the U.S. (i.e., not allowed back in) for 10 years. Attorney Cyrus Mehta notes that prior to this new policy F, J or M students would not accrue unlawful presence if they were not in their academic program, etc., since such students would be admitted for a Duration of Status (i.e., not for a fixed period of time).

Paul Virtue, who helped formulate the policy on unlawful presence in 1997, when he worked at INS, believes the new USCIS policy may be unfair to students. “Under the new policy an adjudicating officer could make a determination that a prior minor infraction could have resulted in months or even years of unlawful presence having already been accrued, leaving the student or exchange visitor with no opportunity to cure the defect. It raises a question of fundamental fairness.”

He thinks the balancing act achieved in the old policy is lost in the new USCIS memo. “The key difference between the new policy and that established in September 1997 is that under the new policy the date on which a person begins to accrue unlawful presence is not tied to an official determination,” explains Virtue. “Therefore, an individual may learn only *after the fact* that he or she has already accrued months of unlawful presence and is left with no recourse for avoiding the 3- and 10-year bars to admission.”

That the new policy is unfair seems clear and, given other recent USCIS policies, some may suspect its purpose is to discourage international students from coming to the United States. That the new policy relies on a report on overstays whose conclusions, upon review, are questionable, may provide additional reason for suspicion.



SEATTLE, WA

DIANE M. BUTLER

@

June 10, 2018

Mr. L. Francis Cissna
Director
U.S. Citizenship & Immigration Services
Department of Homeland Security
20 Massachusetts Avenue, NW
Washington, DC 20529

Submitted via email: publicengagementfeedback@uscis.dhs.gov

Re: Comment on USCIS Policy Memorandum: Accrual of Unlawful Presence and F, J, and M Nonimmigrants

Dear Director Cissna:

I am writing to comment in objection to the U.S. Citizenship and Immigration Services (USCIS) policy memorandum of May 10, 2018, "Accrual of Unlawful Presence and F, J, and M Nonimmigrants."

The memo is an abrupt departure from statutory provisions and over 20 years of policy guidance. In 1996, Congress passed IIRIRA which included unlawful presence provisions.¹ Congress did not intend to expand the definition of unlawful presence to include all violations of status.² USCIS crafted guidance on this complex area of law in the USCIS Memorandum, "Consolidation of Guidance Concerning Unlawful Presence for Purposes of Sections 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I) of the Act," (May 6, 2009). No regulations ever have been promulgated to interpret the meaning of unlawful presence.

Please withdraw the memo and do not incorporate the proposed sections into the Adjudicator's Field Manual. Implementing the changes, planned on August 9, 2018, could result in F, J, and M nonimmigrants being unfairly excluded from the United States through visa application, admissions, and change of status procedures, and it would hinder efforts to attract bright, innovative minds to our country from around the world.

¹ Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Division C of Pub.L. 104-208, 110 Stat. 3009-546, enacted September 30, 1996 (sometimes abbreviated as "IIRAIRA" or "IIRIRA").

² Compare INA §212(a)(9)(B)(ii) defining unlawful presence as the period "after the expiration of the period of stay authorized by the Attorney General, and IIRIRA §632 and INA §222(g), applying unlawful presence only to aliens who "remained in the United States beyond the period of stay authorized," that is, beyond a specific date.

Basis for Providing Comment

I have been practicing immigration law since 1996 and have represented thousands of clients filing a wide range of petitions and applications with USCIS. Working in proximity to the Canadian border, I have dealt extensively with Customs and Border Protection (CBP) and with consular offices on nonimmigrant visa (NIV) issues. I also serve as an advisor to the Trade Development Alliance of Greater Seattle's EDU Roundtable, promoting higher education as an element of trade expansion. This comment focuses on the part of the memorandum that concerns status violation rather than overstay issues, and in particular focuses on what might be construed as unauthorized employment, and the resulting actions by CBP and consular officers.

Summary Examples of Harsh Consequences of Proposed Changes

The policy would have extremely harsh consequences for F-1, J-1, and M-1 nonimmigrants ("NIV students") who engage in activities deemed to constitute even minor, inadvertent, or unwitting, status violations. For example, in the context of work, there may be a range of actions that could be construed to constitute status violations:

- Having an EAD and working for pay for a day as a barrista;
- Weekend babysitting for a host family and receiving Amazon gift cards;
- Working throughout a semester for pay in a job not authorized under Curricular Practical Training or Optional Practical Training;
- Working under OPT in a job that later is determined not to be closely enough related to the degree;
- Working under CPT for two hours more than the 20 hours per week authorized;
- Volunteering to do research for a professor;
- Volunteering in a homeless shelter;
- Investing in and starting a business and working to build it without receiving any pay; or
- Investing in an EB-5 enterprise.

Some examples would appear to constitute technical status violations, but a number are subject to interpretation.

These types of deemed violations due to work might not come to the NIV student's attention until they are outside the United States applying for a visa or applying for entry with CBP. A consular officer or CBP officer may google the student, and see a Facebook post of the student behind a barrista counter or see a LinkedIn reference to the student volunteering in a

professor's lab. The student may have had every intent to comply with all immigration provisions, and may have thought the experience was permitted. Under the proposed policy, the officer would be obliged to find that the unlawful presence clock started ticking on the first day of the volunteer activities.

The problem with the unlawful presence clock under the policy is that it does not turn off. This creates a "gotcha" for the NIV student that could sneak up on him or her or family members for years to come. The policy effectively would impose a guilt-until-proven-innocent standard that is counter to our system of justice.

Due Process Concerns with the Inequity of Lack of Ability to Contest Unlawful Presence

In the context of visa applications and seeking entry to the United States, the NIV student's ability to challenge a decision is curtailed. With the doctrine of consular nonreviewability, once a consular officer issues certain decision such as a 214b immigrant intent denial, the student has no chance to dispute the denial. There is no appeal and no waiver application. Similarly, when a CBP officer at a Port of Entry decides not to let an NIV student enter because the CBP officer decided some activity constituted a status violation, the student has no right to appeal.

Under the existing policy, the ability to contest a status violation decision already is somewhat limited. But the unlawful presence clock does not start and continue to tick. Under the proposed change, NIV students might accrue 180 days or 365 days of unlawful presence without even knowing it – retroactively – and then be barred from the United States for three years or 10 years. This may occur on the brink of the student completing a college degree, as they return from summer break to complete a last semester.

Far-Reaching Ripple Effects

The wide scale on which the policy change would apply could have far-reaching ripple effects. If the NIV student with the deemed violation were a Teaching Assistant, the school relying on having the TA would be left to scramble to fill the need. The schools with these barred NIV students would forego the tuition. The communities where these students resided would be deprived of the diverse exchange of ideas and economic benefits of the students and their families. Moreover, if the NIV student violates status, then the derivative spouse and 18-and-over children also would start accruing unlawful presence from the date of the student's violation, with no way of disputing the allegations.

As a matter of statutory construction, and as a matter of policy, the term "unlawful presence" has been defined as meaning presence in the United States beyond a specified period of time and should not be defined as including a violation of terms of nonimmigrant status where

U.S. Citizenship and Immigration Services
June 10, 2018
Page 4

the period of authorized nonimmigrant status has not expired. Unlawful presence should only trigger when there is clear notice of remaining beyond an expiration date of authorized stay in the United States and not when there is a contestable allegation of violation of status.

NIV students with status violations described herein generally do not present a significant threat to national security and public safety. The proposed policy is so unforgiving that it create chaotic conditions with high levels of unpredictability.

Please reconsider, and do not implement this policy change.

Very truly yours,

Davis Wright Tremain LLP

A handwritten signature in black ink, appearing to read "Diane M. Butler", followed by a long horizontal line extending to the right.

Diane M. Butler

June 11, 2018

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of the Director
20 Massachusetts Avenue, NW
Washington, DC 20529-2140

Submitted via email: publicengagementfeedback@uscis.dhs.gov

Re: USCIS Policy Memorandum: Accrual of Unlawful Presence and F, J, and M Nonimmigrants

Dear Madam or Sir:

I am writing to express my opposition and concerns regarding the new policy memorandum, “Accrual of Unlawful Presence and F, J, and M Nonimmigrants,” posted by U.S. Citizenship and Immigration Services (USCIS) on May 11, 2018.

Briefly stated, the new memorandum will reverse more than 20 years of USCIS practice regarding the accrual of “unlawful presence,” a legal term defined under section 212(a)(9)(B)(ii) of the Immigration and Nationality Act (INA) by reference to an individual who “is present in the United States after expiration of the period of stay authorized by the Attorney General or is present in the United States without being admitted or paroled.” For nonimmigrant students and exchange visitors in the F, J, and M categories, legacy Immigration and Naturalization Service (INS) and USCIS have interpreted the statutory unlawful presence provisions to require notice to the individual of a status violation prior to the commencement of the unlawful presence clock. Such notice is provided in the context of the adjudication of a request for an immigration benefit by USCIS or a determination of a status violation by an immigration judge. The USCIS guidance articulating this position states, “It must be emphasized that the accrual of unlawful presence neither begins on the date that a status violation occurs, nor on the day on which removal proceedings are initiated.”¹ This longstanding policy provides certainty in determining when unlawful presence begins to accrue, which the new policy does not.

As described in the May 11, 2018 memorandum, USCIS will now deem unlawful presence to have started accruing as of the day after the date that a status violation occurs, thus removing the critical procedural safeguard of providing notice to affected individuals that may find themselves subject to the three- and ten-year bars to admissibility. This raises serious questions regarding fundamental fairness and due process and will have a significant negative impact on the student, vocational, and exchange visitor communities.

¹ See USCIS Memorandum, Consolidation of Guidance Concerning Unlawful Presence for Purposes of Sections 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I) of the Act,” (May 6, 2009), available at <http://www.aila.org/infonet/uscis-consolidation-guidance-unlawful-presence>.

In recognition of the fluidity of academic programs, F, M, and J nonimmigrants are not admitted to the U.S. until a date-certain. Instead, they are admitted for the “duration of their status,” or “D/S,” which means the student or exchange visitor can remain in the United States as long as they maintain their nonimmigrant status. This generally means the student must maintain a full course of study or remain in the exchange program, not engage in unauthorized employment or other unauthorized activities, and complete the academic or exchange program in a timely manner or obtain an extension. What the new memorandum fails to recognize is that the question as to whether an individual has violated their nonimmigrant status is complex and nuanced. Students and exchange visitors can accidentally and unknowingly violate their status by dropping slightly below a full course of study, or by engaging in innocent, but unauthorized activity. For example, F-1 students are permitted to engage in work at a “qualifying on-campus job” for up to 20 hours per week while school is in session. Therefore, an F-1 student who inadvertently exceeds the 20-hour limit by just a couple of hours has technically violated his or her student status. In addition, a Designated School Official may make a good faith error in advising a student by authorizing a reduced course load that should not have been approved, thereby leading the student to unknowingly and unintentionally violate their status. This unfairness is compounded when the status violation also serves as the “trigger” for the accrual of unlawful presence by dependents of students and exchange visitors.

Other examples include:

- A student is in the final Spring semester of a Masters program, and is enrolled in his last required course on his degree plan (which is a 3-credit course). The student plans to continue on with his Ph.D. in the Fall semester with a full-time course load. However, the student inadvertently misses the deadline for filing his May graduation paperwork. Therefore, his Masters degree will not be officially awarded until December (the end of the Fall semester). In such a case, it will appear that the student was under-enrolled in the Spring semester, which is a violation of status. In reality, he correctly followed the regulations regarding enrollment, but missed a paperwork deadline.

USCIS states that the purpose of the new guidance is to “reduce the number of overstays” and “to improve how USCIS implements the unlawful presence ground of inadmissibility.” Unfortunately, this approach accomplishes neither of these goals and will instead unfairly punish a potentially significant portion of the student and exchange visitor population, further erode foreign student enrollments at U.S. colleges and universities, and unnecessarily damage the U.S. economy. I urge USCIS to abandon this misguided directive and to maintain the unlawful presence guidance that has been in place for decades and ensures that fundamental fairness is a critical component in interpreting and implementing the unlawful presence statute.

Sincerely,

Julia Siu, M.A.
International Student Counselor
International Student and Scholar Services
Office of International Affairs

Texas Tech University

June 11, 2018

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of the Director
20 Massachusetts Avenue, NW
Washington, DC 20529-2140

Submitted via email: publicengagementfeedback@uscis.dhs.gov

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In recognition of the fluidity of academic programs, F, M, and J nonimmigrants are not admitted to the U.S. until a date-certain. Instead, they are admitted for the “duration of their status,” or “D/S,” which means the student or exchange visitor can remain in the United States as long as they maintain their nonimmigrant status. This generally means the student must maintain a full course of study or remain in the exchange program, not engage in unauthorized employment or other unauthorized activities, and complete the academic or exchange program in a timely manner or obtain an extension. What the new memorandum fails to recognize is that the question as to whether an individual has violated their nonimmigrant status is complex and nuanced. Students and exchange visitors can accidentally and unknowingly violate their status by dropping slightly below a full course of study, or by engaging in innocent, but unauthorized activity. For example, F-1 students are permitted to engage in work at a “qualifying on-campus job” for up to 20 hours per week while school is in session. Therefore, an F-1 student who inadvertently exceeds the 20-hour limit by just a couple of hours has technically violated his or her student status. In addition, a Designated School Official may make a good faith error in advising a student by authorizing a reduced course load that should not have been approved, thereby leading the student to unknowingly and unintentionally violate their status. This unfairness is compounded when the status violation also serves as the “trigger” for the accrual of unlawful presence by dependents of students and exchange visitors.

Other examples include:

- Student was told by previous institution of deadline to transfer SEVIS record out to new institution. However, the deadline provided was incorrect and the student went out of status through no fault of their own. As such, the student was required to file for reinstatement that is still pending after almost 10 months. Should this new policy go into effect, the student would have been out of status and unlawfully present for 14 months at the time of writing. The new policy would ban the student from returning to the U.S. for 3 or 10 years. In this particular case, the student did nothing wrong but was advised incorrectly by his previous institution, yet he would pay the long-term consequences.
- Student fell out of status due to previous institution not following SEVP policies and procedures. As such the student was required to apply for reinstatement but due to the lengthy application process, had to cancel his reinstatement application so he could transfer to a new institution to begin his college career (if he had not transferred, he would not have been able to enroll full-time as required by regulation). He resubmitted his reinstatement application for a second time and at this point has been out of status for approximately 18 months. Given the lengthy reinstatement application approval timeline, it will be almost 24 months before he is approved for full-status. Implementation of this policy would irrevocably harm the student who became out of status through the previous institution’s lack of adherence to SEVP policy. In this case, the student did nothing wrong and has been adhering to all regulations; adopting the new guidance would irrevocably harm this student as he would likely be under the 10 year ban though he faithfully followed all requirements.
- Student fell out of status while waiting for required admissions paperwork to transfer to new institution. Student has been approved for reinstatement but had this policy taken effect, would have been barred from returning for 3 to 10 years due to a paperwork error.

USCIS states that the purpose of the new guidance is to “reduce the number of overstays” and “to improve how USCIS implements the unlawful presence ground of inadmissibility.” Unfortunately, this approach accomplishes neither of these goals and will instead unfairly punish a potentially significant portion of the student and exchange visitor population, further erode foreign student enrollments at U.S. colleges and universities, and unnecessarily damage the U.S. economy. I urge USCIS to abandon this misguided directive and to maintain the unlawful presence guidance that has been in place for decades and ensures that fundamental fairness is a critical component in interpreting and implementing the unlawful presence statute.

Sincerely,

Katie Ahlman



INDIANA UNIVERSITY

OFFICE OF THE VICE PRESIDENT
FOR INTERNATIONAL AFFAIRS

June 11, 2018

To: publicengagementfeedback@uscis.dhs.gov

Re: Accrual of Unlawful Presence and F, J, and M Nonimmigrants

To Whom It May Concern:

I write on behalf of Indiana University in response to the Policy Memorandum on Accrual of Unlawful Presence and F, J, and M Nonimmigrants.

Indiana University enrolls more than 114,000 students on its eight campuses: the flagship campus in Bloomington, which is a residential campus; an urban campus in Indianapolis, which also includes the IU Medical Center; and six regional campuses in the Indiana cities of Gary, South Bend, Fort Wayne, Kokomo, Richmond, and New Albany. The University offers 1,124 degree programs, has more than 250 research centers and institutes, and employs more than 20,000 faculty, professional, and support staff.

Internationally known for the quality of its academic programs and strong international student and scholar support services, Indiana University enrolls more than 8,500 international students and also processes immigrant and non-immigrant work petitions for international faculty, researchers, physicians, and support staff.

Nationwide, per figures obtained from NAFSA: Association of International Educators, international students and scholars contributed \$36.9 billion to the U.S. economy last year and supported 450,331 jobs. Incidentally, that is 400,000 more than all of the coal miners in the United States.

This policy memorandum on unlawful presence is just the latest example of an overly harsh measure taken by the administration to further discourage the world's top international students and scholars from attending our nation's leading colleges and universities—which are global in reach and scope.

Authority

USCIS seems to be overstepping their jurisdiction by drafting a Policy Memorandum in this area. It does not seem to be within USCIS's scope to interpret the start date for a period of overstay. This seems to be better interpreted by the courts or Immigration and Customs Enforcement. Further, moving the penalty for a minor status violation (for example, an I-20 extension or taking one too many on-line classes in pursuit of full-time enrollment) that has heretofore had a simple remedy to the level of unlawful presence is not reasonable nor will it be appreciated by the courts, which will undoubtedly be overwhelmed with challenges.

This Policy Memorandum effectively undermines the SEVIS system, which was to require sponsoring institutions to take actions and verify information within the system knowing

DHS and DOS were recipients of that information. International students and scholars remain the most regulated and monitored group of non-immigrants within U.S. borders. As Designated School Officials and Responsible Officers, international educators serve a vital role in maintaining the integrity/information reporting of their portion of the non-immigrant population, removing a burden that ICE could not possibly carry, while allowing students and scholars to accomplish their goals. Applying a standard of unlawful presence to minor, correctable infractions undermines the ability of the United States to successfully attract and enroll international students and scholars.

Need Analysis

The data analysis provided to justify the need for this policy change is weak. The report only uses one year of data for all of the F, M, and J overstay. The previous two years only measured tourist visa entry/exit data. One set of data points makes it impossible to interpret the data correctly. There is no ability to determine if this is an increasing, decreasing, or maintained trend. To then make assumptions based on a small portion of data is not advisable.

DHS notes the following: "The United States did not build its border, aviation, and immigration infrastructure with exit processing in mind. Consequently, airports in the United States do not have areas designated exclusively for travelers leaving the United States. Instead, traveler departures are recorded biographically using outbound passenger manifests provided by commercial carriers. Under the Advance Passenger Information System legislation, carriers are required to validate the manifest against the travel document presented by the traveler before he or she is permitted to board the aircraft or sea vessel.

DHS classifies individuals as overstay by using the ADIS system to match departure and status change records to arrival records collected during the admission process. DHS identifies individuals as having overstayed if their departure record shows they departed the United States after their lawful admission period expired (i.e., Out-of-Country Overstays). While these individuals are considered overstay, there is evidence indicating they are no longer physically present in the United States. DHS also identifies individuals as possible overstay if there are no records of a departure or change in status prior to the end of their authorized admission period.

Even with the holes in this system, the F, M, and J Suspected In-Country Overstay rate is 2.81 percent of the total number of students and exchange visitors who were expected to change status or depart the United States.

There is no information on length of overstay. One does not trigger the three-year bar until one has accrued more than 180 days, but less than one year, of unlawful presence. Those who accrue one year or more of unlawful presence are barred for ten years. The data do not speak to this information either.

The Overstay Report on which this policy relies also states that DHS is also implementing a biometric-based departure program to complement the biographic data collection that already exists. Perhaps DHS should wait until their data are complete before implementing such unreasonably harsh and unnecessary enforcement measures.

Adjudication Delays

A student who commits a minor technical immigration infraction, such as failing to report an information update, has the option of applying to be reinstated to lawful status. Such

applications are currently taking DHS in excess of 11 months nationwide to adjudicate. According to the new policy memo, if a student's reinstatement application is denied, he or she must immediately depart the country, and the period of time from the date of the original status violation to the date when the reinstatement is denied counts toward the unlawful presence calculation. In other words, that student would then be barred for returning to the United States, potentially for up to 10 years, but most likely for at least three years, depending on the time it takes DHS to adjudicate the application. At a minimum, given current processing times, all students who have reinstatement applications denied will face a three-year bar. We want policies that encourage students to take responsibility for their mistakes in this regard. This new policy will have the opposite effect. This is highly disruptive to the student/scholar experience when there have not necessarily been any unlawful actions taken and they are requesting a legitimate benefit related to their lawful status.

Any reasonable person would ask why USCIS would take so long to adjudicate an application for reinstatement, given their stated purpose of securing our borders and enhancing security.

Impact on Future Applications

It is not clear how this memorandum will impact the processes of the other government agencies (SEVIS records, CBP admission processes and I-94s, DOS and visa issuance). It is not completely clear how a violation may affect future applications (H1-B, LPR), but the potential for a "surprise" finding of a previous violation seems to be a real possibility. These sorts of surprises impact much more than the international applicant, ranging from an American citizen expecting the admission of a fiancé, to institutions anticipating a new professor or researcher, to businesses counting on a new hire.

Dependents

The consequences for dependents is another area of concern. A dependent may have his or her own status violation or be subject to a violation of the F-1 as a dependent. Because dependents may apply for change of status to F-1, J-1, and other statuses, how might USCIS change the review process for determining eligibility for the new status based on the memorandum? This clearly creates the possibility of more RFEs and even longer adjudication processing timelines.

Is this memo attempting to override the current statutory exception to Unlawful Presence applied to minors under the age of 18? How is an F-2, M-2, or J-2 dependent's "conduct or circumstances" evaluated in terms of determining whether a period of authorized stay would end? Why should an individual other than the one who committed the violation be denied benefits?

Questions

Clarification is needed on page 4: An F, J, or M nonimmigrant begins accruing unlawful presence, due to a failure to maintain his or her status on or after August 9, 2018, on the earliest day of any of the following:

- "The day after the Form I-94 expires, if the F, J, or M nonimmigrant was admitted for a date certain"

This bullet point raised some concern for students who have entered the United States with an I-515A. Previously, as long their documentation had been received for adjudication before the end date on the I-94, they were allowed to stay inside the United States even after that date until their request had been approved or denied. Will they now begin accruing days of unlawful presence after the end date on their I-94 documents? What if the request is approved? How will that be annotated so that unlawful presence is not triggered, if that is the end result?

Footnote 17 on page 7 of this memo indicates that an alien who violates status is subject to removal proceedings and rendered deportable. With this remedy already in place, what are the merits of this change in guidance?

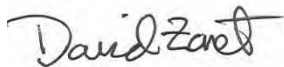
On page 10 the fourth bullet point in the section under “Foreign students (F nonimmigrant) . . .” speaks of cap gap. Perhaps USCIS could also provide guidance on cap gap grace periods for when the H-1B petition is denied or withdrawn, as that continues to be an unclear point within DHS and thus within the community of stakeholders.

Regarding footnote 29 on page 10: “If the reinstatement application is approved, however, no unlawful presence generally will have accrued during the time period in which the student was out of status,” we ask that USCIS clarify what “generally” means in the context of this sentence.

We are fortunate to have proactive systems in place to prevent these inadvertent status violations at Indiana University, but our systems do not have the ability to change the administration’s propensity to do harm to those who come to the United States to make a better life for themselves and their families. What the administration fails to understand is that in the end, it is the United States that will suffer as the world’s leading students, researchers, and scientists go elsewhere to make contributions toward solving the world’s greatest challenges, to be leaders in the arts, education, and industry—and to create jobs.

Thank you for taking the above recommendations under consideration prior to revising this Policy Memorandum.

Sincerely,



David Zaret
Vice President

cc: Christopher Viers, Associate Vice President for International Services
Doug Wasitis, Assistant Vice President for Government Relations

June 11, 2018

Mr. L. Francis Cissna
Director
U. S. Citizenship & Immigration Services
Department of Homeland Security
20 Massachusetts Avenue, NW
Washington, DC 20529

Via email: publicengagementfeedback@uscis.dhs.gov

Dear Director Cissna:

The University of Michigan – Ann Arbor is submitting these comments in response to the U.S. Citizenship and Immigration Services (USCIS) policy memorandum of May 10, 2018, “Accrual of Unlawful Presence and F, J, and M Nonimmigrants.”

The University of Michigan – Ann Arbor is a large public university with more than 8,000 F-1 and J-1 international students, including students pursuing post-completion Optional Practical Training (OPT) or Academic Training, and approximately 1,000 international scholars (J-1 Exchange Visitors), who could be affected by the changes proposed in this policy memorandum.

The change proposed in this policy memorandum is a drastic one as it reverses a policy which has been in effect for over 20 years. Under the current policy, an F-1 student or J-1 Exchange visitor whose I-94 record indicates permission to stay through duration of status (D/S), will not begin to accrue unlawful presence without a formal finding of a status violation made in the course of a DHS benefits determination or by an immigration judge. The current policy thus provides clear notice to the F-1 or J-1 student or J-1 scholar that they must prepare to depart the United States immediately or take action to address the status violation if that is a possibility. The new proposed policy lacks the clarity of the effective date, which is a particular problem since the implications of accruing unlawful presence are so significant; potentially resulting in three-year, ten-year or permanent bars to entrance into the United States.

The University of Michigan is also concerned that this proposed policy change may lead to our international students and scholars being wrongly identified as failing to maintain lawful status, or may lead to our international students and scholars becoming subject to these severe penalties due to minor or technical status violations, or due to the length of time required to adjudicate applications for reinstatement to student status.

Although we agree that the Department of Homeland Security has implemented new tracking mechanisms in the last 20 years, there are still instances in which data in immigration documents and in

Page 1 of 3

██████████, ██████████, Ann Arbor, Michigan ██████████

electronic records such as SEVIS (the Student and Exchange Visitor Information System) could be inconsistent or inaccurate, leading to an erroneous determination that the student or exchange visitor has not maintained lawful status. Also, new initiatives by the Student and Exchange Visitor Program (SEVP) offer the opportunity for students engaged in OPT to update certain personal and employment information through a portal, but due to technical issues and some confusion among students about when and how to enter information, the data entered through this portal is not always accurate. This OPT portal example represents an instance in which a student could be judged to have violated lawful immigration status and would be subject to the severe consequences of accrual of unlawful presence.

Students who apply for reinstatement to F-1 status to address a status violation will not know for many months whether or not their reinstatement application has been approved. The status violation could be relatively minor, such as the failure to maintain full-time enrollment due to dropping one class without obtaining appropriate advance permission. Under current policy, if USCIS ultimately denies the reinstatement request, the student would not start accruing unlawful presence until the date of the denial, which gives sufficient time to either make arrangements to leave the country, or possibly to ask USCIS to reconsider its decision. In the proposed policy, virtually all students whose reinstatement applications are denied would find themselves subject to at least the 3-year bar, merely because USCIS takes so long to adjudicate applications for reinstatement.

Similarly, if students and scholars were under the impression that they were maintaining status but were later determined not to be doing so, they could be subject to the various bars. They would not be able to take action to avoid penalties resulting from unlawful presence since the alleged status violation would be in the past and unlawful presence would have already accrued. This gap presents a significant notice and due process concern for international students and scholars.

Finally, as an institution that values the contributions of our international community, including our F-1 students and our J-1 Exchange Visitors, we are concerned that imposing these significant sanctions for technical or inadvertent errors may discourage international students and scholars planning study or research at the University of Michigan. Our highly skilled international students and scholars may perceive this change as a message that the United States is not welcoming to them, and may choose to pursue studies or research in other countries. Instead, we would hope that USCIS would support policies that do not damage the United States' position as a leader in global education.

Our recommendation is to leave the current policy in place. Of course, we appreciate the need to reduce potential overstays, but, for the reasons explained in this comment letter, we question whether directly equating a violation of nonimmigrant status under INA 214, with the start of counting days of unlawful presence under INA 212(a)(9)(B) is the appropriate way to accomplish that goal. Instead, it is more likely to result in situations in which compliant international students and exchange visitors are found to have accrued unlawful presence due to misunderstandings or inadvertent errors. Like American students, international students should be allowed to complete their studies at their chosen institution, without the stress or fear of being subject to severe penalties based on an oversight of which they may not be aware.

Although this comment letter specifically addresses the proposed policy memo's impact on the University of Michigan, the University also supports and concurs with the comments and recommendations regarding this proposed policy change made by NAFSA: Association of International Educators.

The University of Michigan thanks USCIS for the opportunity to comment on this proposed policy change.

Sincerely,

Judith Pennywell

Judith Pennywell, Ed.D.
Director, International Center
University of Michigan

Louise M. Baldwin

Louise M. Baldwin
Senior Associate Director
International Center, University of Michigan

Robyn K. Brown

June 10, 2018

Mr. L. Francis Cissna
Director, U. S. Citizenship & Immigration Services
Department of Homeland Security
20 Massachusetts Avenue NW
Washington, DC 20529

Submitted via email: publicengagementfeedback@uscis.dhs.gov

Re: PM-602-1060: Accrual of Unlawful Presence and F, J, and M Nonimmigrants

Dear Director Cissna:

As a member of both NAFSA: Association of International Educators and the American Immigration Lawyers Association, I am writing to express my concern regarding the May 10, 2018, USCIS policy memorandum entitled "Accrual of Unlawful Presence and F, J, and M Nonimmigrants" (PM-602-1060).

I have seen up close the harsh effects resulting from unintentional and harmless violations of F and J nonimmigrant status. Not only for individual students and visiting scholars, but for the future of the prosperity of the U.S. higher education system, our nation's economy, and diplomatic relationships around the world, I urge you to reconsider the new policy.

As a Designated School Official (DSO), I have terminated records in the Student & Exchange Visitor Information System (SEVIS) for status violations and informed students that they must leave the U.S. weeks after earning their degree simply because they worked a few weeks after graduation without authorization in an effort to help their professors. *See* 8 C.F.R. 214.3(g)(2) (listing the reporting obligations of schools certified by the Student & Exchange Visitor Program). I have observed firsthand how stressful the F-1 reinstatement process can be due to its unpredictable timelines and requests for evidence. In none of the circumstances I have encountered has the student willfully ignored the regulations pertaining to their status or maliciously sought to harm the people of the United States.

In my direct experience working with hundreds of international students, nearly all students that come to the United States endeavor to follow the regulations. They have often invested their family's savings on an opportunity to achieve a U.S. degree, and they fully intend to make the most of the chance they have been given. However, they do not always completely understand the responsibilities of their nonimmigrant status. The requirements of their nonimmigrant status can be complicated even for practitioners that deal with the regulations on a daily basis. Sometimes the students also do not comprehend that what seems to them a minor violation—such as dropping a class because they are experiencing financial hardship—can actually derail the entire trajectory of their academic and career plans.

The USCIS should also take into consideration that international students and scholars are not licensed to practice law and are typically outside their own country's legal systems for the first time in their lives. Further, most staff members at universities that provide international students and scholars with guidance and report mandated information to the SEVIS database are not licensed attorneys. *See* 8 C.F.R. 214.3(l) (listing the qualifications for DSOs). It would be impractical to require these school officials to be lawyers, as the student services field simply cannot attract enough qualified individuals for the salaries offered by higher education institutions.

Despite these challenges, schools strive to communicate the regulations accurately to their international students and scholars, and they work diligently toward increasing compliance with reporting deadlines. However, no matter how well-trained and knowledgeable the staff is, and no matter how well-thought-out the processes are for gathering and reporting the required data, individuals do make mistakes from time to time. Under the new policy, such a mistake could have drastic results in the life of a student or scholar that is not aware of the mistake until they have already accrued more than 180 days of unlawful presence. Accordingly, when they depart the U.S., they will be unable to return for at least 3 years. *See* section 212(a)(9)(B) of the Immigration & Nationality Act.

For a variety of innocuous reasons, a student or scholar may not realize for months that he or she is "out of status." For example, after the SEVIS registration period that occurs at the beginning of each semester, *see* 8 C.F.R. 214.3(g)(2)(iii), a university with a busy international student office that serves a large number of international students may not notice if a student withdraws from one class mid-semester because he is afraid of failing the course. Only the next semester, when the student requests a travel signature on his Form I-20 (Certificate of Eligibility) and the university re-verifies enrollment, might the DSO recognize and report the student's violation. By that time, several months would have passed by.

Under the current policy, these students can apply for reinstatement, stay in the United States, and continue their studies without fear that they may accrue unlawful presence while they are awaiting adjudication of their applications. *See, e.g.,* section 40.9.2(b)(1)(E)(ii) of the USCIS Adjudicator's Field Manual (emphasizing that for nonimmigrants admitted for duration of status, the accrual of unlawful presence does not begin on the date a status violation occurs); 8 CFR 214.2(f)(16) (discussing reinstatement to F-1 status).

Under the new policy that becomes effective in August, the same student who applies as soon as he realizes he is out of status could accrue more than 180 days of unlawful presence simply while compiling his reinstatement application and awaiting its adjudication, if his application is ultimately denied. The lengthy USCIS adjudication timelines make such an occurrence not merely a risk but nearly a certainty. The most recent data available on the USCIS website indicates the national average processing time for Form I-539 (used for reinstatement applications) was 4.4 months, as of January 2018.

The new policy will have draconian effects on well-intentioned students who pose no threat to the United States but merely committed a violation of their nonimmigrant status that most Americans likely find forgivable, such working off-campus when a sponsoring relative has experienced a tragedy and can no longer afford to pay the student's tuition. Moreover, the USCIS's unexpected shift from decades of policy guidance on the accrual of unlawful presence for F, J, and M

nonimmigrants will intensify the inhospitable environment that already urges many students to choose enrollment at universities in other countries. As word of this new policy and its implications spread, prospective international students will increasingly seek to pursue their higher education goals in countries that are more welcoming. By continuing to announce and implement policies that communicates they are unwelcome in the United States, the United States will forfeit their talents, skills, and innovative ideas. Further, their economic contributions—such as tuition dollars, funds spent at U.S. stores and rental properties, and the creation of future businesses that provide U.S. citizens with jobs—will be lost to other countries.

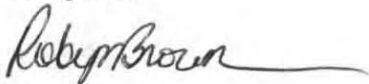
The current policy regarding the accrual of unlawful presence makes sense because it encourages students to admit their mistakes and seek to resolve them, and it allows them to resume full-time enrollment and continue contributing to their schools and communities. The new policy will encourage students who have forgotten to extend their I-20, have dropped below full-time enrollment, or have otherwise fallen out of status to remain in the shadows. They will have no incentive to identify themselves and seek a remedy to their status violation by filing for reinstatement, because doing so will likely result in their removal from the United States. The new policy will thus make it harder, not easier, to track international students and their activities.

In addition, as deftly explained in NAFSA's comment dated May 24, 2018, there does not appear to be interagency coordination of the implementation of this new policy. Namely, the U.S. Department of State administers the Exchange Visitor Program and issues visas to students and scholars, and within the U.S. Department of Homeland Security, Immigration and Customs Enforcement (ICE) and Customs and Border Protection (CBP) have vital operations that will be significantly affected by the new policy. Until the DOS, ICE, and CBP have had a chance to discuss and plan for what this means for enforcement, adjudication, and investigation, the new policy should not be finalized and implemented.

For the aforementioned reasons, I agree with NAFSA's comment letter that the current policy should remain in place until the new policy can be more fully considered through a transparent process. If the USCIS's policy is implemented, I urge that the extension of stay/change of status tolling rules be expanded to apply to reinstatement applications. *See* AFM 40.9.2(b)(2)(G). Further, if the policy is put into effect, I urge the USCIS to expand the sections of the AFM describing situations in which unlawful presence does not accrue. *See* revisions to AFM 40.9.2(b)(1)(E)(iii) as described in PM-602-1060.

Thank you for your consideration of these comments.

Best regards,



Robyn Brown

Member, NAFSA: Association of International Educators

Member, American Immigration Lawyers Association

June 11, 2018

Mr. L. Francis Cissna
Director
U.S. Citizenship & Immigration Services
Department of Homeland Security
20 Massachusetts Avenue, NW
Washington, D.C. 20529

Dear Director Cissna:

As leaders of associations representing two and four year, public and nonprofit, institutions of higher education, we write to express serious concern with the U.S. Citizenship and Immigration Services (USCIS) policy memorandum dated May 10, 2018 concerning the “Accrual of Unlawful Presence for F, J, and M Nonimmigrants.” As written, the memo obscures and conflates the important distinction between “unlawful presence” – illegal presence in the United States – and “maintenance of status” – as defined under the Immigration and Nationality Act (INA). This proposed action would cause significant disruption and harm to educational and research programs at American colleges and universities. We want to work with USCIS to address any security concerns related to visa overstays and to ensure that visa policies and systems are efficient and effective so that our nation can continue to benefit from the presence of talented international students, scholars, and researchers.

As you are aware, there are very serious consequences if an individual is found unlawfully present in the United States – including a bar to reenter the country for a period of three or 10 years. Under the proposed policy, USCIS would rely on the information entered into the Student and Exchange Visitor Information System (SEVIS) to determine if an F, M, or J visa holder violated their immigration status, rather than on an official determination by an immigration judge or the Department of Homeland Security. By equating “unlawful presence” with “failure to maintain status,” this new policy may pose very serious consequences for foreign students, the U.S. universities where they pursue higher education, and contribute to a highly problematic trend of sending the wrong messages about the U.S. as a welcoming country for international students.

Unlike all other visa holders, F, M and J nonimmigrants (foreign students and exchange visitors) are allowed to enter the United States for the duration of status—known as “Duration of Status” or “(D/S)” – rather than for a “date certain.” Under current agency policy promulgated by the 1997 “Virtue memo,”¹ a student or exchange visitor only begins to accrue “unlawful presence” after a USCIS adjudicator or immigration judge makes a formal finding that the individual violated their status. If implemented, the May 10, 2018 USCIS policy memorandum would fundamentally change the way the federal government calculates periods of unlawful presence for students beyond their Duration of Status.

There are many benign reasons why a student or exchange visitor might inadvertently fail to maintain status, including a change in practical training or employment status, medical leave, or a reduction in credit-bearing coursework. The SEVIS system attempts to capture information confirming compliance with some but not all situations that might be useful in identifying a failure to maintain status, including unintentional failures. Additionally, SEVIS is not a flawless system. It has been subject to automated and clerical errors including human error on the part of government agencies. These are not infrequent occurrences. The compliance and enforcement implications of USCIS’ new proposed policy are incredibly nuanced and complex, with very serious consequences for a violation. As a matter of good faith, fairness, and practicality, unlawful presence should only trigger if and when the student has been clearly notified of a potential violation. Moreover, unlawful presence policy, because of the severe

¹ 1997 Virtue Memo: https://www.nafsa.org/uploadedFiles/virtue_memo_on_interpreting.pdf?n=234

consequences, should not by definition regularly capture unknowing violations. International students should not be expected to have deep expertise in immigration law to be able to interpret a potential violation without clear notification from the U.S. government.

We are very concerned that under the proposed policy, “unlawful presence” could be erroneously triggered by technical, unintentional or unknown violations in an individual’s SEVIS records. We are also concerned that the proposed policy can be applied retroactively, and that an ambiguous or inconsistent regulatory interpretation may bar a student from the U.S. for up to 10 years without the ability to cure the mistake or challenge the finding. This would have very far-reaching impacts on the higher education community as well as the United States’ ability to attract students, scholars, scientists and researchers to our campuses.

As a legal matter, this new interpretation of “unlawful presence” suggested by the agency is directly inconsistent with statutory language. The Immigration and Nationality Act (INA) contains no language suggesting that “failure to maintain status,” a term used frequently throughout the statute, is equivalent to “unlawful presence,” a term used in the Act only for the purpose of creating bars to inadmissibility. Congress has been very clear that “maintenance of status” relates to F, M, and J visas while “unlawful presence” is a wholly distinct concept inapplicable to these visa categories. In enacting the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Congress overhauled the enforcement provisions of the INA while retaining or adding references to “maintenance of status.” In doing so, Congress clearly chose *not* to use the phrase “unlawful presence” relative to F, M, and J visas rather retaining the use of “maintenance of status” with the intent of keeping distinct definitions that the policy memorandum would eliminate.

In IIRIRA, Congress left the harshest statutory penalties for unlawful presence – three year and ten year bars for admission to the United States. There is no mechanism for exceptions or waivers once an individual is subject to one of these bars. Elsewhere, Congress established other penalties, including removal from the United States or ineligibility for lawful permanent resident status, for failure to maintain status - but allowed some exceptions and waivers in those situations, although extremely limited. The statutory scheme quite simply does not permit a reasonable reading that conflates unlawful presence and maintenance of status.

Moreover, we are deeply troubled with the manner in which USCIS announced this proposed change, without an official regulatory notice in the Federal Register for public comment. The U.S. higher education and research communities have long enjoyed constructive partnerships with the State Department and Department of Homeland Security in support of national security. We urge DHS to engage the higher education community and other stakeholders through the standard rulemaking process as required under the Administrative Procedures Act before implementing such a drastic shift in policy.

We are eager to work with USCIS and other federal agencies to address any concerns regarding student visa overstays to ensure the protection of our national security while upholding our nation’s values and interests. Please do not hesitate to reach out to Hanan Saab at hsaab@aplu.org if we can be helpful as you consider our concerns.

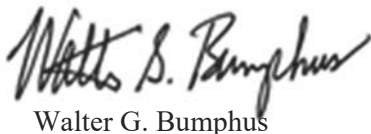
Sincerely,



Peter McPherson
President
Association of Public and Land-grant
Universities



Mary Sue Coleman
President
Association of American Universities



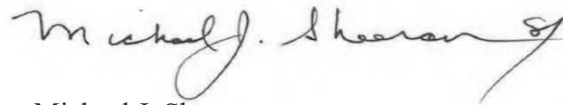
Walter G. Bumphus
President
American Association of Community Colleges



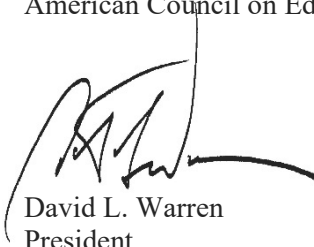
Mildred García
President
American Association of State Colleges and
Universities



Ted Mitchell
President
American Council on Education



Michael J. Sheeran
President
Association of Jesuit Colleges and Universities



David L. Warren
President
National Association of Independent Colleges and Universities

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June 10, 2018

To Whom It May Concern,

We are writing on behalf of Miami University's International Students and Scholar Services office, in response to the USCIS policy memo issued May 10, 2018, "Accrual of Unlawful Presence and F, J, and M Nonimmigrants." We are deeply concerned that this policy change will have a negative impact on our students. Accrual of unlawful presence beginning the day after an F, J, or M nonimmigrant fails to maintain status, presumes that individuals are able to regain status immediately. Depending on the particular point in the semester, Miami students who fall below full-time enrollment may not have the opportunity to regain status immediately due to closure of course registration. This policy change also appears to contradict other policies like 8 CFR 214.2(f)(16)(A) which indicates that applying for reinstatement within five months is allowable and considered taking action in a timely manner. We also believe the policy change will negatively impact our students who have already lost status and are currently waiting for the adjudication of reinstatement applications. Processing times for reinstatement may extend beyond 180 days depending on the service center as is the case for centers in California (approximately five months) and Vermont (approximately one year). The proposed change does not consider how application processing times will affect accrual of unlawful presence for students who lose status and seek to take appropriate action.

We are also concerned that the new policy may increase the liability of Designated School Officials and their institutions in assisting students with maintenance of status. The amount of time allowed for implementation of this policy change is very short and insufficient for our institution to update policies, educate students, and send notifications to those who may be immediately affected. Our university currently lacks the technology necessary to monitor student enrollment closely enough to take early action to prevent loss of status. In addition, DSOs will be expected to advise students on matters beyond their purview. This policy update is complex and has far-reaching implications that we are also struggling to fully grasp. However, students will expect us to outline the implications of this policy and how they should proceed if they find that they are accruing days of unlawful presence. Due to the limitations of our perspective and our desire to avoid unauthorized practice of law by giving legal advice, we will need to refer our students to attorneys. Our students' access to immigration attorneys is limited because, our university is located in a small, rural town with few legal resources and no immigration attorneys. Our office's priority is to serve our students by providing resources and sound

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MiamiOH.edu/global

guidance related immigration matters. The extent to which we may need to do so in response to the proposed policy change could open the university to increased legal risk.

In addition to the impact of this change in policy on students and DSOs, there are several concerns regarding the clarity and timing of the update. Implementation time for school officials would be minimal. University staff will need time to update informational material such as webpages, handouts, and emails. Because the change will happen over the summer and many international students and scholars may be in their home country for the break period, the information sent by school officials at this time would likely be ineffective in reaching the intended audience. Many school officials have follow up questions to clarify the change in policy and it would be best if the implementation time could be pushed back in order to allow time to clarify any "gray areas." Lastly, if this change in policy takes effect, it does somewhat contradict other policies. For example, the general standard for taking action in a timely manner for a loss of legal status is to file for to regain legal status within five months. The contradiction in policies should be clarified before implementation.

We appreciate your consideration and thought in how this change in policy needs time to be clarified and how concerned we are, as school officials, that this could have severe repercussions on international students and scholars.

Best,

International Student and Scholar Services
Miami University
Oxford, Ohio 45056

CompeteAmerica

The Alliance for a Competitive Workforce

Comment filed to: publicengagementfeedback@uscis.dhs.gov

L. Francis Cissna, Director
U. S. Citizenship & Immigration Services
20 Massachusetts Avenue, NW
Washington, DC 20529

June 11, 2018

Re: Comments on Proposed Policy Memorandum entitled “Accrual of Unlawful Presence and F, J, and M Nonimmigrants,” PM-602-1060

Dear Director Cissna,

On behalf of Compete America, we submit this letter in response to the May 11th publication by USCIS of a proposed Policy Memorandum suggesting a new agency approach concerning the “Accrual of Unlawful Presence and F, J, and M Nonimmigrants.” The agency proposes abandoning the prior policy that, in most situations, required an official government determination and notice, or the expiration of a date-certain period of stay, before unlawful presence could accrue.

The Compete America coalition is the leading advocate for reform of U.S. immigration policy for highly educated foreign professionals. Our [coalition members](#) include higher education associations, industry associations, and employers. Coalition members collaborate to reflect where possible the common interests of universities and colleges, research institutions, and corporations, and administrators and lawyers that represent these organizations, with regard to high-skilled employment-based immigration. For more than 20 years, Compete America has worked with successive administrations and Congress on issues critical to immigration compliance in the employment-based immigration system, as well as the global mobility of talent. The Coalition is committed to continuing its efforts to ensure that the United States has the capacity to educate, obtain, and retain the talent necessary for continued innovation and job creation in the United States.

INCORPORATING STATEMENTS BY OTHERS

As an initial matter, we want to state that the Compete America coalition supports the comments filed by the members of our coalition from the higher education community. Specifically, Compete America would like to incorporate by reference the detailed [comment filed by NAFSA](#), the Association of International Educators, as well as the [comment filed by AAU and APLU](#), respectively the American Association of Universities and the Association of Public and Land-grant Universities. The joint letter from AAU and APLU was also co-signed by the American Council on Education, the American Association of Community Colleges, the American Association of State Colleges and Universities, the National Association of Independent Colleges, and Universities, and the Association of Jesuit Colleges and Universities, thus representing almost all post-secondary institutions in the United States.

Compete America also incorporates by reference the statements of legacy INS Executive Associate Commissioner Paul Virtue, who was recently interviewed by *Forbes* magazine about the origins of the current agency policy governing Accrual of Unlawful Presence and F, J, and M Nonimmigrants. We include in the Compete America comment the entirety of the [Forbes article on unlawful presence policy](#), so that is considered by the agency in your assessment of public comments on the current proposal. The article highlights that:

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The USCIS proposed new policy “strays from the bright line created in 1997.”

“The earlier policy put the foreign national on notice by virtue of an official determination that he or she had begun to accrue unlawful presence on a specific date. ... [F]undamental fairness dictates such clear notice.”

We believe that Mr. Virtue’s statements, coming from one of the chief architects of the current policy, lay out two critical defects with the agency’s proposed new policy, one legal and one practical. We believe that each of these defects, standing alone, warrants USCIS dropping the proposed policy change until further analysis can be completed by the agency.

As a matter of law, we do not believe that federal agencies are free to adopt policies that do not comply with Fundamental Fairness. As explained by the NAFSA comment as well as the AAU and APLU comment, the new suggested policy will *inevitably* lead to individuals finding out after the fact that they have already accrued months of unlawful presence, thus subjecting themselves to the three- and ten-year bars to admission. For example, it appears that USCIS consistently takes in excess of six months to adjudicate requests for reinstatement which means that any student that seeks to correct even a minor violation will automatically be left with at least a three-year bar should that request be rejected for any reason. Furthermore, under the new policy the spouses of impacted students and exchange visitors, as well as children over age 18, will face three- and ten-year bars through no fault of their own and without knowledge of when the principal F-1, M-1 or J-1 visa holder may have inadvertently violated a term or condition of student or exchange visitor status. These severe and unforgiving results seem unfair, especially in the vast and dispersed enterprise that is the activities of foreign-born students and exchange visitors in the United States, primarily conducted on the campuses of U.S. universities and colleges.

As a matter of policy, operationalizing the approach reflected in the new proposal leaves the unlawful presence determination *without* a bright line, which is impractical for the agency. This is fraught with an expectation of inconsistencies and uncertainty. While the current policy was initially adopted 20 years ago to be implemented primarily by one agency – INS, as part of the Department of Justice, there are three separate component agencies of the Department of Homeland Security that now have significant and active responsibilities related to this policy – USCIS as well as its sister agencies Immigration and Customs Enforcement and Customs and Border Protection. The draft policy memorandum does not reflect whether ICE’s Student and Exchange Visitor Program was properly consulted, if other alternatives might solve the problem USCIS is trying to address, or if ICE and CBP stand ready to implement the new suggested approach. Under both the old and new proposal, the Bureau of Consular Affairs at the Department of State plays a role as well. It would seem there are, or should be, operational concerns about this new approach including but not limited to significant interagency work that must be completed before announcing the implementation of a new policy.

LEGAL ISSUES

In the short time period provided for public review and comment, shortened in effect, in part, because the agency’s policy concerns regarding unlawful presence were not otherwise publicly known in advance of the May 11th publication of the draft policy memorandum, our coalition has not been able to fully flesh out nor agree on how to address the complex legal issues presented by USCIS’s new suggested approach. Nevertheless, we want to flag two primary legal issues for consideration. We hope the comments of other stakeholders will delve into more substantive analysis of these same points, as well as other legal concerns, but we want to at least identify what we see as two principal legal concerns.

We believe the following two legal issues are considerable and complicated, and merit USCIS stepping back from its proposal:

1. Failure to Comply with Requirements for an Agency Change in Interpretation

We are surprised the agency is moving forward with such a dramatic departure from the policy that has been in place since September 1997 without either satisfying the controlling “good guidance” requirements, providing a sufficiently robust rationale for its new approach, or complying with the Administrative Procedure Act (APA).

The Office of Management and Budget, Executive Office of the President, laid out requirements for agencies that seek to put forward new policies without engaging in notice and comment rulemaking, found in the Final Bulletin for Agency Good Practices, 72 Fed. Reg. 3432 (Jan. 25, 2007). The Bulletin establishes requirements for significant guidance documents, including publication in the Federal Register and an agency obligation to provide a comment and response document. Under the Bulletin, a “significant guidance document” means a guidance document disseminated to regulated entities or the general public that may reasonably be anticipated to, among other things, either materially alter the rights and obligations of the regulated community or raise novel legal or policy issues. (See p. 3439 of the Jan. 25, 2007 Federal Register notice.) It seems clear that the proposed policy memorandum announcing a new interpretation of unlawful presence under the Immigration and Nationality Act is a significant guidance document.

At a minimum, even where an agency is merely engaging in an effort to change its interpretation of a controlling statute, the Supreme Court has made clear the agency has an obligation to identify a rationale for its changed position that is not arbitrary. (See *Encino Motorcars v. Navarro*, 138 S.Ct. 1134 (2018).) It does not seem USCIS has satisfied that requirement given that it is unclear from the proposed policy memorandum either what the precise problem is that the agency is trying to solve or its reasoning for the proposed change. For example, part of the rationale provided seems to be based on a DHS Overstay Report that identifies an approximate overstay rate of 6% for F-1 students, but the report’s methodology leaves it murky at best what this overstay calculation is based in. It is not evident that F-1 overstay representations in the report account for individuals who remain *lawfully* in the United States after the date identified on their SEVIS I-20, including individuals who change nonimmigrant status or adjust status to permanent resident after marrying an American. It also is not clear whether the F-1 overstay rates include or exclude students on STEM OPT extensions. Moreover, another part of the rationale USCIS provided is grounded in an unfounded reliance on what USCIS apparently believes is the uncontroverted precision and completeness in the Student and Exchange Visitor Information System (SEVIS). The agency’s suggested reliance on SEVIS as a panacea to accurately identify failures to maintain status is misplaced, especially because SEVIS does not necessarily provide notice to the impacted individuals. The claimed basis for this policy shift must be cogent and may not be capricious in order to pass muster in the first instance, a standard it is difficult to see that the agency has satisfied. Perhaps most vitally, the agency has not described the problem it is attempting to resolve with the new interpretation. The Immigration and Nationality Act provides full authority, in clear and unequivocal terms, to initiate removal proceedings concerning any alien that it can show has violated the terms and conditions of her nonimmigrant status. Why this authority needs to be supplemented by a broad expansion of the definition of unlawful presence is never explained.

In addition, it may be that the suggested policy is in fact a substantive rule and not an interpretive one, necessitating APA compliance. We are aware that in recent years the Supreme Court has acted to largely remove the obligation of federal agencies to undergo public notice and comment rulemaking to revise a “mere” interpretation. (See *Perez v Mortgage Bankers Association*, 135 S. Ct. 1190 (2015).) However, the suggested policy shift on unlawful presence may require public notice and comment rulemaking nevertheless. It seems that where a statute has not changed but an agency’s abrupt change of course will create *binding* new and wholly unexpected changes to the rights and obligations of the regulated community, public notice and comment rulemaking is indeed required – because the new interpretation is in effect a substantive rule. Especially when, as here, the agency’s new interpretation will itself *create* severe and unforgiving results (bars to admission for which there are largely no waivers or exceptions), it may the interpretation is best considered a substantive rule, where the public is entitled to the protections afforded by the APA.

2. As a Matter of Statutory Interpretation, Unlawful Presence Should Not Be Interpreted as Equivalent to a Failure to Maintain Status

The new, suggested interpretation seems to ignore fundamental principles of statutory construction by equating “unlawful presence” and “failure to maintain status” under the Immigration and Nationality Act (hereafter INA).

In enacting the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (Division C of Pub.L. 104–208, enacted September 30, 1996) (hereafter referred to as IIRIRA), Congress overhauled the enforcement provisions of the INA. Among other things, Congress reworded and revised the grounds of inadmissibility generally, removed the previous distinction between exclusion and deportation, removed discretion that had long been left to Immigration Judges, and in general took many steps to provide a stricter system concerning immigration enforcement.

In IIRIRA, Congress established three-year and ten-year bars to inadmissibility under section 212(a)(9)(B) of the INA for aliens who are “unlawfully present” in the United States for a period of 180 days or one year, respectively. Congress defined “unlawful presence” as being “present in the United States after the expiration of the period of stay by the Attorney General.” Similarly, for purposes of nonimmigrant visa validity IIRIRA established at section 222(g)(1) of the INA that for aliens admitted to the country on nonimmigrant visas who “remained in the United States beyond the period of stay authorized by the Attorney General” such visas were deemed voided “beginning after the conclusion of such period of stay.” Section 222(g) has been consistently interpreted by the Departments of Justice, Homeland Security, and State as applying only to aliens who remain beyond a specific date on their I-94 Record of Admission or any extension or change of status, and consistently interpreted as not including aliens who violated the terms of their nonimmigrant status. Indeed, the plain meaning of “the expiration of the period of stay authorized” is remaining beyond a specified date – not violating the terms of status. And, the meaning of this phrase in both 222(g) and 212(a)(9) *must* be the same. It is the most basic tenet of statutory construction that Congress could not have intended two different meanings when it used the exact same language in two different sections.

Moreover, equating unlawful presence with a failure to maintain status, as proposed in USCIS’s draft policy memorandum, fails to account for the numerous places in IIRIRA where Congress retained or added references to “maintenance of status” while Congress chose *not* to use that phrase in *defining* unlawful presence. In the context of IIRIRA’s enactment, it is particularly significant that Congress *retained* and expanded the use of the maintenance of status concept while *also* creating a new concept of unlawful presence that was *not* defined in the INA in terms of maintenance of status.

To expand the definition of unlawful presence to include all violations of status cannot be reconciled with other language utilized by Congress in IIRIRA and in the INA. When defining unlawful presence, Congress did not make specific reference to violation of the terms of status or unauthorized employment or a failure to maintain status. Rather, Congress made specific reference to presence in the United States after the expiration of a specified period of time.

Indeed, when Congress intended to punish any failure to maintain nonimmigrant status or failure to comply with the conditions of such status, Congress stated such intention in plain language. For example, the following sections of the INA establish penalties tied to maintenance of status:

- Section 241(a)(1)(C) renders an alien removable if she has “failed to maintain nonimmigrant status ... or to comply with the conditions of any such status.”
- Section 245(c)(2) renders an alien ineligible for adjustment of status to permanent resident if the alien engages in unauthorized employment or “is in unlawful immigration status” or “has failed to maintain continuously a lawful status.”
- Section 245(c)(7), added by section 375 of IIRIRA, creates a bar to adjustment of status to permanent resident for an alien who “is not in a lawful nonimmigrant status.”
- Section 245(c)(8), added by section 375 of IIRIRA, renders an alien ineligible for adjustment of status to permanent resident status if the alien “has otherwise violated the terms of a nonimmigrant visa.”

In other words, the INA language shows that failure to maintain status and unlawful presence are not the same. Congress established exceedingly harsh penalties for unlawful presence – three year and ten year bars for admission to the United States in any status for any purpose – that in most cases are not subject to exceptions or waivers. It established other penalties, including removal or ineligibility for lawful permanent resident status described above, for failure to maintain status, for which waivers may be available and for which there are exceptions for a technical violation. The two – unlawful presence and failure to maintain status – cannot be conflated under the statutory scheme.

CONCLUSION

The Compete America coalition is concerned about USCIS's proposal. In short, the draft policy memorandum suggests revising a bright-line rule that has been in place for the last 20 years that has been both fair and practical. The negative impact to the higher education community and foreign-born students and exchange visitors is clear and direct. In addition, the new approach will ultimately have a negative impact in the employer community. It will create the dynamic of employers engaged in on-campus recruitment finding out years after an inadvertent violation or innocuous, technical violation that a foreign-born employee earning her undergraduate or graduate degree in the United States was unlawfully present, and inadmissible for a new status. Moreover, conflating unlawful presence and maintenance of status does not as a matter of logic only apply to students and exchange visitors admitted for a "D/S" period (duration of status) or Canadian visitors who are treated as duration of status nonimmigrants. Thus, adopting the proposed new approach seems to necessarily portend a future – although as of yet unannounced – where *all* nonimmigrants are presumed by USCIS to accrue unlawful presence without notice if later determined to have violated a term or condition status, to include employer-sponsored nonimmigrant classifications such as the H-1B and L-1 categories. This overbreadth would inject significant uncertainty into the legal immigration system.

Compete America urges USCIS to abandon implementation of a new policy interpreting Accrual Unlawful Presence for F, J, and M visa holders until the agency has had more time to carefully consider the legal implications of and legal requirements for a new approach while also allowing time to complete what should be necessary interagency work as well as work with stakeholders to address some of the unnecessary and negative implications of a change in policy.

Compete America always welcomes the opportunity to work with the agency to improve the nation's immigration system. We would be willing to sit with policymakers to discuss this issue, should that be helpful. We thank you in advance for any consideration you can give to the concerns we have raised.

Respectfully,

A handwritten signature in black ink, appearing to read "Scott Corley", with a stylized, cursive script.

Scott Corley
Executive Director, Compete America



a ministry of Disciples Home Missions

disciplesimmigration.org · [REDACTED] · [REDACTED] · [REDACTED]

tana@dhm.disciples.org

June 11, 2018

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of the Director
20 Massachusetts Avenue, NW
Washington, DC 20529-2140

Submitted via email: publicengagementfeedback@uscis.dhs.gov

Re: USCIS Policy Memorandum: Accrual of Unlawful Presence and F, J, and M Nonimmigrants

Dear Madam or Sir:

I am writing to express my opposition to the new policy memorandum, "Accrual of Unlawful Presence and F, J, and M Nonimmigrants," posted by U.S. Citizenship and Immigration Services (USCIS) on May 11, 2018.

This new policy could negatively impact the many Disciples seminarians who would serve as our ministers and apply their theological education to build up the Christian Church (Disciples of Christ) in the U.S. and Canada.

Briefly stated, the new memorandum will reverse more than 20 years of USCIS practice regarding the accrual of "unlawful presence," a legal term defined under section 212(a)(9)(B)(ii) of the Immigration and Nationality Act (INA) by reference to an individual who "is present in the United States after expiration of the period of stay authorized by the Attorney General or is present in the United States without being admitted or paroled."

For nonimmigrant students and exchange visitors in the F, J, and M categories, legacy Immigration and Naturalization Service (INS) and USCIS have interpreted the statutory unlawful presence provisions to require notice to the individual of a status violation prior to the commencement of the unlawful presence clock. Such notice is provided in the context of the adjudication of a request for an immigration benefit by USCIS or a determination of a status violation by an immigration judge. The USCIS guidance articulating this position states, "It must be emphasized that the accrual of unlawful presence neither begins on the date that a status violation occurs, nor on the day on which removal proceedings are initiated."¹ This longstanding policy provides certainty in determining when unlawful presence begins to accrue, which the new policy does not.

¹ See USCIS Memorandum, Consolidation of Guidance Concerning Unlawful Presence for Purposes of Sections 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I) of the Act," (May 6, 2009), available at <http://www.aila.org/infonet/uscis-consolidation-guidance-unlawful-presence>.

As described in the May 11, 2018 memorandum, USCIS will now deem unlawful presence to have started accruing as of the day after the date that a status violation occurs, thus removing the critical procedural safeguard of providing notice to affected individuals who may find themselves subject to the three- and ten-year bars to admissibility. This change raises serious questions regarding fundamental fairness and due process and will have a significant negative impact on the student, vocational, and exchange visitor communities.

In recognition of the fluidity of academic programs, F, M, and J nonimmigrants are not admitted to the U.S. until a date-certain. Instead, they are admitted for the “duration of their status,” or “D/S,” which means the student or exchange visitor can remain in the United States as long as she maintains her nonimmigrant status. What the new memorandum fails to recognize is that the question as to whether an individual has violated her nonimmigrant status is complex and nuanced. Students and exchange visitors can accidentally and unknowingly violate their status by dropping slightly below a full course of study, or by engaging in innocent, but unauthorized activity. This unfairness is compounded when the status violation also serves as the “trigger” for the accrual of unlawful presence by dependents of students and exchange visitors.

For example:

- An F-1 seminary student is permitted to engage in work at a “qualifying on-campus job” for up to 20 hours per week while school is in session. Therefore, an F-1 student who inadvertently exceeds the 20-hour limit by just a couple of hours has technically violated his student status.
- A Designated School Official may make a good faith error in advising a student by authorizing a reduced course load that should not have been approved, thereby leading the student to unknowingly and unintentionally violate her status.
- A seminarian may be approved for Curricular Practical Training (CPT) in a field education position not sufficiently related to the course of study or a clinical pastoral education (CPE) program that does not meet the requirements, thereby leading the student to unknowingly and unintentionally violate her status.
- A seminarian may volunteer in an unpaid church or ministry position that, under technical employment laws, classifies him as an “employee,” thereby leading the student to unknowingly and unintentionally violate his status.

USCIS states that the purpose of the new guidance is to “reduce the number of overstays” and “to improve how USCIS implements the unlawful presence ground of inadmissibility.”

Unfortunately, this approach accomplishes neither of these goals and will instead unfairly punish students with severe three and ten year bars while depriving us of their gifts and graces. I urge USCIS to abandon this misguided directive and to maintain the unlawful presence guidance that has been in place for decades and ensures that fundamental fairness is a critical component in interpreting and implementing the unlawful presence statute.

Sincerely,



Tana Liu-Beers, Esq.
Immigration Legal Counsel
Disciples Home Missions

June 7, 2018

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of the Director
20 Massachusetts Avenue, NW
Washington, DC 20529-2140

Submitted via email: publicengagementfeedback@uscis.dhs.gov

Re: USCIS Policy Memorandum: Accrual of Unlawful Presence and F, J, and M Nonimmigrants

Dear Madam or Sir:

I am writing to express my opposition and concerns regarding the new policy memorandum, "Accrual of Unlawful Presence and F, J, and M Nonimmigrants," posted by U.S. Citizenship and Immigration Services (USCIS) on May 11, 2018.

Briefly stated, the new memorandum will reverse more than 20 years of USCIS practice regarding the accrual of "unlawful presence," a legal term defined under section 212(a)(9)(B)(ii) of the Immigration and Nationality Act (INA) by reference to an individual who "is present in the United States after expiration of the period of stay authorized by the Attorney General or is present in the United States without being admitted or paroled." For nonimmigrant students and exchange visitors in the F, J, and M categories, legacy Immigration and Naturalization Service (INS) and USCIS have interpreted the statutory unlawful presence provisions to require notice to the individual of a status violation prior to the commencement of the unlawful presence clock. Such notice is provided in the context of the adjudication of a request for an immigration benefit by USCIS or a determination of a status violation by an immigration judge. The USCIS guidance articulating this position states, "It must be emphasized that the accrual of unlawful presence neither begins on the date that a status violation occurs, nor on the day on which removal proceedings are initiated."¹ This longstanding policy provides certainty in determining when unlawful presence begins to accrue, which the new policy does not.

As described in the May 11, 2018 memorandum, USCIS will now deem unlawful presence to have started accruing as of the day after the date that a status violation occurs, thus removing the critical procedural safeguard of providing notice to affected individuals that may find themselves subject to the three- and ten-year bars to admissibility. This raises serious questions regarding fundamental fairness and due process and will have a significant negative impact on the student, vocational, and exchange visitor communities.

¹ See USCIS Memorandum, Consolidation of Guidance Concerning Unlawful Presence for Purposes of Sections 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I) of the Act," (May 6, 2009), available at <http://www.aila.org/infonet/uscis-consolidation-guidance-unlawful-presence>.

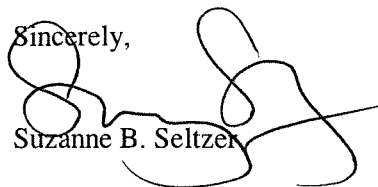


In recognition of the fluidity of academic programs, F, M, and J nonimmigrants are not admitted to the U.S. until a date-certain. Instead, they are admitted for the “duration of their status,” or “D/S,” which means the student or exchange visitor can remain in the United States as long as they maintain their nonimmigrant status. This generally means the student must maintain a full course of study or remain in the exchange program, not engage in unauthorized employment or other unauthorized activities, and complete the academic or exchange program in a timely manner or obtain an extension. What the new memorandum fails to recognize is that the question as to whether an individual has violated their nonimmigrant status is complex and nuanced. Students and exchange visitors can accidentally and unknowingly violate their status by dropping slightly below a full course of study, or by engaging in innocent, but unauthorized activity. For example, F-1 students are permitted to engage in work at a “qualifying on-campus job” for up to 20 hours per week while school is in session. Therefore, an F-1 student who inadvertently exceeds the 20-hour limit by just a couple of hours has technically violated his or her student status. In addition, a Designated School Official may make a good faith error in advising a student by authorizing a reduced course load that should not have been approved, thereby leading the student to unknowingly and unintentionally violate their status. This unfairness is compounded when the status violation also serves as the “trigger” for the accrual of unlawful presence by dependents of students and exchange visitors.

Other examples include:

- Technical issues with SEVIS
 - Most recently, data exchange problems between SEVIS and SEVP portal where SEVIS did not properly save employer data that students entered in the portal;
 - More frequently, erroneous terminations in SEVIS due to pending applications;
- Working on OPT in a field that is later determined not to be the “major area of study;”
- J-1 remaining beyond the 30 day grace period because J-1 waiver pending but later denied;
- Beginning a degree program while still on OPT;
- J-1 mistakenly letting insurance lapse, but immediately correcting it;

USCIS states that the purpose of the new guidance is to “reduce the number of overstays” and “to improve how USCIS implements the unlawful presence ground of inadmissibility.” Unfortunately, this approach accomplishes neither of these goals and will instead unfairly punish a potentially significant portion of the student and exchange visitor population, further erode foreign student enrollments at U.S. colleges and universities, and unnecessarily damage the U.S. economy. I urge USCIS to abandon this misguided directive and to maintain the unlawful presence guidance that has been in place for decades and ensures that fundamental fairness is a critical component in interpreting and implementing the unlawful presence statute.

Sincerely,

Suzanne B. Seltzer



University of California
San Francisco

Brian K. Groves
Director
International Students & Scholars Office
Student Academic Affairs
University of California, San Francisco

William J. Rutter Center
[REDACTED]
San Francisco, CA [REDACTED]
[REDACTED]

June 11, 2018

Mr. L. Francis Cissna
Director
U. S. Citizenship & Immigration Services
Department of Homeland Security
20 Massachusetts Avenue,
NW Washington, DC 20529

Dear Director Cissna:

I'm writing in response to the U.S. Citizenship and Immigration Services (USCIS) policy memorandum of May 10, 2018, "Accrual of Unlawful Presence and F, J, and M Nonimmigrants" on behalf of the University of California. As one of the largest public university systems in the United States, the University of California hosts tens of thousands of international students and researchers across its ten campuses. As written, application of this new policy has the potential create significant harm to students and exchange visitors for circumstances that may be beyond their control. The bright line in determining unlawful presence under the current policy becomes unnecessarily complex and arbitrary as outlined in the new policy. We believe the existing policy to be fair, reasonable and in the best interest of the United States.

Of greatest concern is the possibility of the new policy to inadvertently subject student and exchange visitors to the bars on re-entry. As part of its justification for the new policy, the USCIS cites the agency's reliance on new technologies and systems, specifically mentioning the SEVIS system. While the USCIS may be confident of the data integrity of the SEVIS system, it's important to note that SEVIS is managed by a different agency, Immigration and Customs Enforcement, and draws data from several other agency systems including Customs and Border Protection and the Department of State. The complexity of interagency data collection frequently leads to inaccuracies in a student or exchange visitor's record. Overreliance on interagency systems should not replace a legal examination based on the totality of evidence, taking in account all applicable law and policy.

A common scenario in conflict with the new policy would be when an F-1 student returns to the US after a brief visit home but is incorrectly admitted by CBP as an F-2 dependent. When the student checks his admission record in the CBP I-94 database, he finds the record of his



University of California
San Francisco

latest entry is missing but his previous entry is still recorded as F-1 D/S. Based on this record he resumes study and his on-campus employment. Six months later the student applies for Optional Practical Training but is denied because of the incorrect entry status and subsequently becomes subject to the three-year bar. In this scenario, the student may have been at fault for not questioning CBP about his latest entry record, however the actual problem was precipitated by the incorrect port-of-entry record.

Such status issues are compounded by lengthy USCIS adjudication times for many benefits, students may only learn of any violation of status and accrual of unlawful presence long after they have the ability to correct the violation or leave in a timely manner.

Because the INA 212(a)(9)(B) penalties are so severe, we believe the current policy is inherently fair. The University of California also concurs with NAFSA's recommendations in lieu of implementing the new rule. These are:

- Leave in place the current policy, which has served for over 20 years. Neither DHS nor legacy INS ever published regulations to implement this important area of law. If the agency wishes to implement such a drastic change to longstanding common interpretation of the law, it must be done through the notice and comment process.
- Do not implement any policy change until implementation has been fully coordinated with the Department of State and other DHS units such as CBP and SEVP
- Exclude from the unlawful presence count any status violations that occurred under color of law.
- Apply the change of status/extension of stay tolling rules to reinstatement applications.
- Expand the sections describing examples where F, M, and J nonimmigrants "do not accrue unlawful presence in certain situations."

Thank you for your opportunity to comment.

A handwritten signature in black ink, appearing to read "BG", followed by a horizontal line.

Brian Groves
Director, International Students and Scholars Office

June 11, 2018
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of the Director
20 Massachusetts Avenue, NW
Washington, DC 20529-2140

Submitted via email: publicengagementfeedback@uscis.dhs.gov

Re: USCIS Policy Memorandum: Accrual of Unlawful Presence and F, J, and M Nonimmigrants

Dear Madam or Sir:

I am writing to express my opposition and concerns regarding the new policy memorandum, “Accrual of Unlawful Presence and F, J, and M Nonimmigrants,” posted by U.S. Citizenship and Immigration Services (USCIS) on May 11, 2018.

Briefly stated, the new memorandum will reverse more than 20 years of USCIS practice regarding the accrual of “unlawful presence,” a legal term defined under section 212(a)(9)(B)(ii) of the Immigration and Nationality Act (INA) by reference to an individual who “is present in the United States after expiration of the period of stay authorized by the Attorney General or is present in the United States without being admitted or paroled.” For nonimmigrant students and exchange visitors in the F, J, and M categories, legacy Immigration and Naturalization Service (INS) and USCIS have interpreted the statutory unlawful presence provisions to require notice to the individual of a status violation prior to the commencement of the unlawful presence clock. Such notice is provided in the context of the adjudication of a request for an immigration benefit by USCIS or a determination of a status violation by an immigration judge. The USCIS guidance articulating this position states, “It must be emphasized that the accrual of unlawful presence neither begins on the date that a status violation occurs, nor on the day on which removal proceedings are initiated.”¹ This longstanding policy provides certainty in determining when unlawful presence begins to accrue, which the new policy does not.

As described in the May 11, 2018 memorandum, USCIS will now deem unlawful presence to have started accruing as of the day after the date that a status violation occurs, thus removing the critical procedural safeguard of providing notice to affected individuals that may find themselves subject to the three- and ten-year bars to admissibility. This raises serious questions regarding fundamental fairness and due process and will have a significant negative impact on the student, vocational, and exchange visitor communities.

In recognition of the fluidity of academic programs, F, M, and J nonimmigrants are not admitted to the U.S. until a date-certain. Instead, they are admitted for the “duration of their status,” or

¹ See USCIS Memorandum, Consolidation of Guidance Concerning Unlawful Presence for Purposes of Sections 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I) of the Act,” (May 6, 2009), available at <http://www.aila.org/infonet/uscis-consolidation-guidance-unlawful-presence>.

“D/S,” which means the student or exchange visitor can remain in the United States as long as they maintain their nonimmigrant status. This generally means the student must maintain a full course of study or remain in the exchange program, not engage in unauthorized employment or other unauthorized activities, and complete the academic or exchange program in a timely manner or obtain an extension. What the new memorandum fails to recognize is that the question as to whether an individual has violated their nonimmigrant status is complex and nuanced. Students and exchange visitors can accidentally and unknowingly violate their status by dropping slightly below a full course of study, or by engaging in innocent, but unauthorized activity. For example, F-1 students are permitted to engage in work at a “qualifying on-campus job” for up to 20 hours per week while school is in session. Therefore, an F-1 student who inadvertently exceeds the 20-hour limit by just a couple of hours has technically violated his or her student status. In addition, a Designated School Official may make a good faith error in advising a student by authorizing a reduced course load that should not have been approved, thereby leading the student to unknowingly and unintentionally violate their status. This unfairness is compounded when the status violation also serves as the “trigger” for the accrual of unlawful presence by dependents of students and exchange visitors.

USCIS states that the purpose of the new guidance is to “reduce the number of overstays” and “to improve how USCIS implements the unlawful presence ground of inadmissibility.” Unfortunately, this approach accomplishes neither of these goals and will instead unfairly punish a potentially significant portion of the student and exchange visitor population, further erode foreign student enrollments at U.S. colleges and universities, and unnecessarily damage the U.S. economy. I urge USCIS to abandon this misguided directive and to maintain the unlawful presence guidance that has been in place for decades and ensures that fundamental fairness is a critical component in interpreting and implementing the unlawful presence statute.

Sincerely,

Pilar Ellis
PDSO, Fullerton College



Dartmouth College • Office of Visa and Immigration Services

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June 11, 2018

Lee Francis Cissna, Director
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
20 Massachusetts Avenue, NW
Washington, DC 20529-2140

Submitted via email: publicengagementfeedback@uscis.dhs.gov

Re: USCIS Policy Memorandum: Accrual of Unlawful Presence and F, J and M
Nonimmigrants

Dear Director Cissna,

Dartmouth College submits these comments regarding the recently issued USCIS policy memorandum, "Accrual of Unlawful Presence and F, J, and M Nonimmigrants" (PM-602-1060) posted by USCIS on May 11, 2018.

Founded in 1769, Dartmouth is a member of the Ivy League. Dartmouth is committed to providing the best undergraduate liberal arts experience, and outstanding graduate programs in the Geisel School of Medicine, the Thayer School of Engineering, the Tuck School of Business, and the Guarini School of Graduate and Advanced Studies. Dartmouth sponsors international F-1 students as well as non-degree students, research scholars, visiting faculty and other visitors on our J-1 Exchange Visitor Program.

As both an F and J program sponsor, Dartmouth is deeply concerned by the agency's abrupt and significant departure from current policy guidance on unlawful presence and how it is determined for F and J nonimmigrants. Under the proposed changes, F and J nonimmigrants can be charged with unlawful presence for years without any notice or due process based on an unknowing or inadvertent violation of immigration status. This puts F and J nonimmigrants at risk of being unfairly subjected to the 3-year, 10-year and permanent bars to reentry that come with accrual of unlawful presence, which under current and longstanding policy is triggered when there is a formal determination by an immigration judge or DHS official, and clear notice provided to the nonimmigrant. The current policy provides a procedural framework and certainty in calculating when unlawful presence accrues. The proposed policy does not. It eliminates due process, and creates uncertainty and unpredictability.

The rules governing maintenance of status for F and J nonimmigrants are myriad and complex. Designated School Officers (DSOs) and Responsible/Alternative Responsible Officers

(ROs/AROs) place the utmost importance on compliance with these rules, and we work closely with international students and exchange visitors to ensure they maintain their nonimmigrant status and fulfill their government reporting obligations. Under the proposed policy, unlawful presence would begin to accrue without notice, and possibly without the individual's or the sponsoring institution's knowledge, if students or exchange visitors inadvertently, unintentionally, or unknowingly do something that could be interpreted as a violation of status. If the unlawful presence clock started at some point in the past, any window for departing the country before triggering the 3 or 10-year bar will have passed without the individual's knowledge.

We have strong concerns that this proposed policy will discourage international students, researchers and faculty from coming to the U.S. because of the risk that a minor infraction or technical violation could put them at risk of being barred to reentry for years.

In light of the foregoing, Dartmouth respectfully asks the agency to withdraw this memorandum.

Thank you for the opportunity to comment.

Sincerely,



Susan C. Ellison
Director, PDSO, RO
Office of Visa and Immigration Services
Dartmouth College

Iandoli Desai & Cronin P.C.

[REDACTED] Boston, MA [REDACTED]
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Dónal Eoin Reilly
Mary E. Walsh
Jennifer A. McGill
*Admitted in California

June 11, 2018

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of the Director
20 Massachusetts Avenue, NW
Washington, DC 20529-2140

Submitted via email: publicengagementfeedback@uscis.dhs.gov

Re: USCIS Policy Memorandum: Accrual of Unlawful Presence and F, J, and M Nonimmigrants

Dear Madam or Sir:

I am writing to express my opposition and concerns regarding the new policy memorandum, "Accrual of Unlawful Presence and F, J, and M Nonimmigrants," posted by U.S. Citizenship and Immigration Services (USCIS) on May 11, 2018.

The new memorandum will reverse more than 20 years of USCIS practice regarding the accrual of "unlawful presence," a legal term defined under section 212(a)(9)(B)(ii) of the Immigration and Nationality Act (INA) by reference to an individual who "is present in the United States after expiration of the period of stay authorized by the Attorney General or is present in the United States without being admitted or paroled." For nonimmigrant students and exchange visitors in the F, J, and M categories, legacy Immigration and Naturalization Service (INS) and USCIS have interpreted the statutory unlawful presence provisions to require notice to the individual of a status violation prior to the commencement of the unlawful presence clock. Such notice is provided in the context of the adjudication of a request for an immigration benefit by USCIS or a determination of a status violation by an immigration judge. The USCIS guidance articulating this position states, "It must be emphasized that the accrual of unlawful presence neither begins on the date that a status violation occurs, nor on the day on which removal proceedings are initiated."¹ This longstanding policy provides certainty in determining when unlawful presence begins to accrue, which the new policy does not.

As described in the May 11, 2018 memorandum, USCIS will now deem unlawful presence to have started accruing as of the day after the date that a status violation occurs, thus removing the

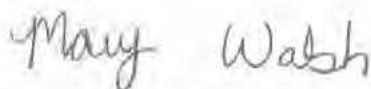
¹ See USCIS Memorandum, Consolidation of Guidance Concerning Unlawful Presence for Purposes of Sections 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I) of the Act," (May 6, 2009), available at <http://www.aila.org/infonet/uscis-consolidation-guidance-unlawful-presence>.

critical procedural safeguard of providing notice to affected individuals that may find themselves subject to the three- and ten-year bars to admissibility. This raises serious questions regarding fundamental fairness and due process and will have a significant negative impact on the student, vocational, and exchange visitor communities.

In recognition of the fluidity of academic programs, F, M, and J nonimmigrants are not admitted to the U.S. until a date-certain. Instead, they are admitted for the "duration of their status," or "D/S," which means the student or exchange visitor can remain in the United States as long as they maintain their nonimmigrant status. This generally means the student must maintain a full course of study or remain in the exchange program, not engage in unauthorized employment or other unauthorized activities, and complete the academic or exchange program in a timely manner or obtain an extension. What the new memorandum fails to recognize is that the question as to whether an individual has violated their nonimmigrant status is complex and nuanced. Students and exchange visitors can accidentally and unknowingly violate their status by dropping slightly below a full course of study, or by engaging in innocent, but unauthorized activity. For example, F-1 students are permitted to engage in work at a "qualifying on-campus job" for up to 20 hours per week while school is in session. Therefore, an F-1 student who inadvertently exceeds the 20-hour limit by just a couple of hours has technically violated his or her student status. In addition, a Designated School Official may make a good faith error in advising a student by authorizing a reduced course load that should not have been approved, thereby leading the student to unknowingly and unintentionally violate their status. This unfairness is compounded when the status violation also serves as the "trigger" for the accrual of unlawful presence by dependents of students and exchange visitors.

USCIS states that the purpose of the new guidance is to "reduce the number of overstays" and "to improve how USCIS implements the unlawful presence ground of inadmissibility." Unfortunately, this approach accomplishes neither of these goals and will instead unfairly punish a potentially significant portion of the student and exchange visitor population, further erode foreign student enrollments at U.S. colleges and universities, and unnecessarily damage the U.S. economy. I urge USCIS to abandon this misguided directive and to maintain the unlawful presence guidance that has been in place for decades and ensures that fundamental fairness is a critical component in interpreting and implementing the unlawful presence statute.

Sincerely,



Mary E. Walsh, Esq.
Iandoli Desai & Cronin P.C.
[REDACTED]
Boston, MA [REDACTED]



The State University
of New York

Kristina M. Johnson, PhD
Chancellor

[REDACTED]
Albany, New York [REDACTED]

www.suny.edu

June 11, 2018

Mr. L. Francis Cissna
Director
U. S. Citizenship & Immigration Services
Department of Homeland Security
20 Massachusetts Avenue, NW
Washington, DC 20529

Dear Director Cissna:

On behalf of The State University of New York (SUNY), I write to you today to express my deep concern regarding the U.S. Citizenship and Immigration Services (USCIS) policy memorandum of May 10, 2018 on the “Accrual of Unlawful Presence and F, J, and M Nonimmigrants” (“May 10 Memorandum”). The May 10 Memorandum equates “unlawful presence” with “maintenance of status” which is contrary to the statutory framework under the Immigration and Nationality Act (“INA”) and represents a significant departure from policy guidance that has been in effect for more than 20 years. Such departure may negatively impact not only our international student population but also our economy and rich academic programs that thrive on the contributions of our international community members.

At SUNY alone, there were 22,216 international students on the F and J visas in the Fall of 2016, and 21,976 in the Fall 2017. In terms of the economy, international students contribute \$36.9 billion to the U.S. economy, and create or support 450,331 jobs. In New York State, international students and exchange visitors contribute \$4.6 billion and support 55,851 jobs. In coordination with other higher education institutions and organizations, we believe we can work with USCIS and the Department of Homeland Security (“DHS”) on resolving national security concerns without jeopardizing the substantial benefits international students bring to our country, the State of New York, and SUNY.

The May 10 Memorandum sets forth an operationally complex structure, which may mistakenly identify a large number of foreign students and exchange visitors as failing to maintain lawful status and unfairly subjecting them to the 3-year, 10-year, or permanent bars to re-entry to the

United States. International students, like their domestic counterparts, should be allowed to complete their studies at their chosen institution, without the stress or fear of being deported based on an oversight of which they may not be aware.

Further, USCIS may achieve the goal of reducing the number of non-immigrants who violate their status or stay beyond the legally allowable period through the implementation of various policies within the sub-agencies of DHS and in collaboration with other federal agencies. These policy changes should be explored and implemented before announcing a policy change that will apply a disproportionate punishment of the 3-year, 10-year, and permanent bars of admissibility to international students and exchange visitors and their spouses and children.

Background

The current policy has held up for more than 20 years because it provides bright-line dates established in government systems, which give adequate notice of unlawful presence to students and exchange visitors and their schools and exchange programs. Under current policy, non-immigrants begin to accrue unlawful presence the day after DHS denied their request for an immigration benefit, if DHS made a formal finding that they violated their non-immigrant status while adjudicating a request for another immigration benefit; the day after their Form I-94 (travel document) expired or the day after an immigration judge or in certain cases, the Board of Immigration Appeals (BIA), ordered them excluded, deported, or removed (whether or not the decision is appealed). The bright lines of the expiration date on a Form I-94 or the date an immigration judge ordered the non-immigrant deported are easy to see. Failure to maintain status under the F, M, and J visa programs do not present such a bright line, however, particularly because there is overlap between different types of “status.” For example,

- Visa status (the validity period of the nonimmigrant visa in one’s passport)
- SEVIS status (the draft, initial, active, completed, deactivated, or terminated status of a nonimmigrant’s electronic record in the Student and Exchange Visitor Information System database)
- Non-immigrant status (abiding by the duration and other conditions of the nonimmigrant category in which an alien is admitted to the United States by DHS)

It is not easy for a non-immigrant to discern when a violation of status has occurred. There may be inconsistency among immigration documents, electronic records, and actions that lead to a determination in violation of status. There could also be situations where documents and actions are not being interpreted correctly by various stakeholders involved with the non-immigrant’s duration of stay. Plainly stated, immigration law is complicated, and both compliance and enforcement is a very technical matter that requires training and expertise. Because of this complexity, an alien might not even know he is “out of status” until informed by the government.

There are some violations of status that can easily be fixed with proper advisement or correction of documents while findings of unlawful presence are far more detrimental to the non-immigrant and not easily cured. DHS is now proposing to directly equate a failure to maintain non-immigrant status accorded under INA §214 (setting forth conditions of admission and duration of stay in the U.S in a non-immigrant status), with the start of counting days of unlawful presence under INA 212(a)(9)(B) (explicitly considering an alien to be unlawfully present in the United States if present in the United States *after the expiration of the period of stay* authorized by the Attorney General). Since a failure to maintain status has the potential of being fixed, there should be no expiration of the period of stay until there is a finding that the failure to maintain status cannot be fixed, which finding is clearly communicated to the non-immigrant. Thus, the policy in place for the last 20 years that distinguishes between status violations and unlawful presence makes sense for purposes of applying INA 212(a)(9)(B), from both legal and public policy viewpoints. A clear government determination, whether it is the expiration date on a non-immigrant's Form I-94 or a formal finding by an immigration judge, serves as a fair and clear warning to an alien that the clock is ticking, and she must take action to leave the United States or otherwise cure the deficiency, if possible. An alien who persists after such fair notice, must face the possibility of not being able to return to the United States for either 3 or 10 years.

Finally, there is nothing in the statutory framework to support the equation of the two concepts of failure to maintain non-immigrant status with unlawful presence. Indeed, when Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA") and overhauled INA enforcement provisions, it chose not to use the phrase "unlawful" presence relative to F, M, and J visas, leaving in references to "maintenance of status" to those categories. It was clearly the intent of Congress to leave the two concepts separate.

Fairness

Because the INA 212(a)(9)(B) penalties are so severe, we must also weigh the fairness of the policies enforcing that law. Long USCIS adjudication times, for example, may lead to someone becoming subject to the unlawful presence penalties in any case that is ultimately denied. For example, consider a student who registers for fewer classes than she should have one semester, which leads her school to terminate her SEVIS record. In good faith, the student registers for a full course of study the next semester, and applies in good faith to USCIS to reinstate her student status. It is not uncommon for a USCIS Service Center to take six months or longer to adjudicate an application for reinstatement to student status.

Under current USCIS policy, if USCIS ultimately denies the student's reinstatement, she would start counting unlawful presence as of the date of the denial, which gives sufficient time to either make arrangements to leave the country, or possibly to ask USCIS to

reconsider its decision. In the proposed policy, virtually all students whose reinstatement applications are denied would find themselves subject to at least the 3-year bar, merely because USCIS took so long to adjudicate applications for reinstatement.

In addition, a student or exchange visitor might not even know that he was in violation of status until DHS makes a formal determination of that. If the unlawful presence “clock” is seen to start at some distant time in the past in such cases, any window for departing the country will have passed.

Recommendation

In lieu of implementing the policy described in the memo, SUNY respectfully requests that the current policy, which has served us well for over 20 years, remain in place. Neither DHS nor legacy INS ever published regulations to implement this important area of law. If the agency wishes to implement such a drastic change to longstanding common interpretation of the law, it is best done through the formal rulemaking under the Administrative Procedures Act. This will allow for a thoughtful notice and comment period. As I stated at the outset, the higher education community is able to provide thoughtful commentary that will inform you and the other sub-regulatory agencies of DHS in order to protect national security and promote a robust economy and rich academic programs that are supported by international students and exchange visitors.

Thank you for the opportunity to comment.

Sincerely yours,

A handwritten signature in black ink, appearing to read 'Kristina M. Johnson', with a stylized flourish at the end.

Kristina M. Johnson, PhD
Chancellor

Carnegie Mellon University

Office of International Education

[REDACTED] Pittsburgh, PA [REDACTED]
Phone: [REDACTED] • Email: [REDACTED] • Web: [REDACTED]

June 10, 2018

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of the Director
20 Massachusetts Avenue, NW
Washington, DC 20529-2140

Submitted via email: publicengagementfeedback@uscis.dhs.gov

Re: USCIS Policy Memorandum: Accrual of Unlawful Presence and F, J, and M Nonimmigrants

Dear Madam/Sir:

I am writing to express my opposition to and concerns about the new policy memorandum, "Accrual of Unlawful Presence and F, J, and M Nonimmigrants," posted by U.S. Citizenship and Immigration Services (USCIS) on May 11, 2018. This new memorandum will reverse more than 20 years of US government practice regarding the accrual of "unlawful presence" and represents a shift in policy guidance of deeply impactful and potential negative consequences. I respectfully encourage the Service to reconsider and withdraw this memo.

The main concerns I have are the fairness of the policy, the ability of nonimmigrants in F, M and J statuses to understand it, the ability of various agencies who already struggle with inter-agency coordination to implement it and the potential negative impacts upon our economy and national security.

Unlawful Presence defined for F, J and M categories. The legal term of "unlawful presence," is defined under section 212(a)(9)(B)(ii) of the Immigration and Nationality Act (INA) as an individual who "is present in the United States after expiration of the period of stay authorized by the Attorney General or is present in the United States without being admitted or paroled." For 20+ years, legacy Immigration and Naturalization Service (INS) and USCIS have interpreted the statutory unlawful presence provisions with respect to nonimmigrant students and exchange visitors in the F, J, and M categories to require notice to the individual of a status violation prior to the commencement of the unlawful presence clock. Such notice is provided in the context of the adjudication of a request for an immigration benefit by USCIS or a determination of a status violation by an immigration judge. This longstanding policy provides certainty in determining when unlawful presence begins to accrue, which the new policy does not.

Fluidity and complexity of non-immigrant status, even with legal presence. Nonimmigrant status is a legal condition, not a physical thing. It is dynamic, not static, which means that a person's nonimmigrant status must be acquired and maintained, and can be changed, or lost, and in some circumstances, reinstated. Especially with respect to F, M and J statuses, these actions, events, and data are often recorded and presented in relation to one another in the form of physical and electronic documents and records. Documents and electronic records only point to immigration status, though; they do not stand in the place of it. If all documents and electronic records are consistent, their reliability as indicators of immigration status is high. However, these documents and records reflect only a snapshot in time, they reflect only some, not all, actions, events, and data, and they are subject to both machine and human error.

Inherent, systemic complexities. A failure to account for inconsistency among immigration documents, electronic records, and actions and events in the real world could lead to an adverse determination on status or benefit eligibility. Whether the data in documents and electronic records is being interpreted correctly, taking into account all applicable law and policy, is also a primary concern.

Recommendation to uphold the current practice and policy. The current policy has held up for more than twenty years because it provides bright-line dates established in government systems, which give adequate notice to students and exchange visitors and their schools and exchange programs. The expiration date on a date-certain Form I-94 is one such clearly established date. If an individual stays beyond that date, he or she begins to accumulate days of unlawful presence. Students and scholars with the Duration of Status (D/S) notation, do not have that bright-line date. Further, many status violations do not present such a bright line, either, particularly because there is overlap between different types of "status." For example, there are three different types of "statuses" which apply to F, M and J persons, which may confuse the point at which "unlawful presence" may begin accruing:

- Visa status (the validity period of the nonimmigrant visa in your passport)
- SEVIS status (the draft, initial, active, completed, deactivated, or terminated status of a nonimmigrant's electronic record in the Student and Exchange Visitor Information System database)
- Nonimmigrant status (abiding by the duration and other conditions of the nonimmigrant category in which an alien is admitted to the United States by DHS)

Proposal results in the unnecessary application of the 3- and 10-year bars. The proposal to directly equate a violation of nonimmigrant status accorded under INA 214, with the start of counting days of unlawful presence under INA 212(a)(9)(B), as of the day after the date that a status violation occurs, removes the critical procedural safeguard of providing notice to affected individuals that may find themselves subject to the three- and ten-year bars to admissibility. This raises serious questions regarding fundamental fairness and due process and will have a significant negative impact on the student, vocational, and exchange visitor communities.

Current regulations support mutual goals. We agree that students and exchange visitors need to follow the regulations governing their status however, regulations/policies governing maintenance of F, M and J status have grown increasingly complex and there are occasions when student inadvertently or unknowingly violate a provision of the rules governing their status. This proposed change makes things exponentially more complex. Like American students, foreign students should be allowed to complete

their studies at their chosen institution, without the stress or fear of being deported based on an oversight of which they may not be aware.

Examples of situations which may cause "unlawful presence" to begin accruing, or confusion about accrual, under new memorandum include:

- A student submitting an address update to one institutional email account, not realize it is not the correct institutional process for submitting address updates that will be forwarded to SEVIS, thus technically not submitting their address update within 10 days.
- A student who has been focused on his/her studies and realizes at the last minute that their I-20 will expire, submits an extension request at 5:00 pm on the day it expires. While technically requested "in time", the DSO cannot process the extension that day. The SEVIS system will allow for the extension beyond that date if submitted by the PDSO. Does unlawful presence accrue?
- A STEM OPT 6 month report is submitted but cannot be submitted to SEVIS because of SEVIS system error. Again, does unlawful presence accrue?
- A student who is having difficulty in a course is advised by their academic advisor to drop the course in order to avoid failing grade. The student doesn't realize they must also obtain reduced course load approval from their DSO, if applicable. The student applies for reinstatement, which typically take 6+ months to be adjudicated. Under this memorandum, it appears that the student may be accruing days of unlawful presence and thus be subject to the bar even if the reinstatement is granted because of the Service's slow processing times.
- CLAIMS data does not properly update in SEVIS thus causing a student to not receive an email with Student Portal log in information and causing problems with the ability to properly update SEVIS. Reporting dates may be missed and the student may not be aware of the issue.

Current status violation safeguards protect mutual goals. While an alien who violates his or her nonimmigrant status is certainly removable, the policy in place for the last 20 years that distinguishes between status violations and unlawful presence makes sense for purposes of applying INA 212(a)(9)(B), from both legal and public policy viewpoints. A clear government determination, whether it is the expiration date on a nonimmigrant's Form I-94, or a formal finding of a status violation made in the course of a DHS benefits determination or by an immigration judge, serves as a fair and clear warning to an alien that the clock is ticking, and he or she must take action to leave the United States or otherwise cure the status deficiency. An alien who persists after such fair notice, must face the possibility of not being able to return to the United States for either 3 or 10 years.

Immigration policy is incredibly complex with dire consequences for violation. The concept of "unlawful presence" with various "clocks," "tolling" provisions, and "bars" has to this point been the purview of immigration law specialists and law school classes. Foreign students, scholars, and exchange visitors are not immigration attorneys or policy professionals and it is unfair to treat them as such. Unlawful presence should only trigger when there is clear notice of remaining beyond an expiration date of authorized stay in the United States and not when there is a contestable allegation of violation of status.

Economic benefits of education and research in the US support US security also. Homeland Security's Secure Borders and Open Doors Advisory Committee noted in 2008 that it is the mission of the Departments of Homeland Security and State "to protect not only America's security but also our

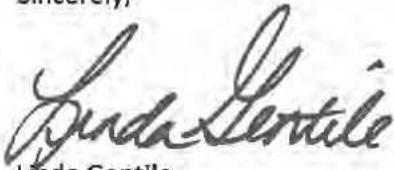
economic livelihood, ideals, image, and strategic relationships with the world.” Hosting foreign students, researchers, faculty and international visitors are critical components of this effort and, yet, data shows that foreign student interest in studying in the US is flattening, if not outright declining. This proposal is yet another policy which makes the United States less attractive to talented foreign students, scholars, and exchange visitors and undoubtedly will encourage them to look elsewhere to do their groundbreaking research and build diplomatic ties. Foreign students, scholars, and exchange visitors are here to learn, and they make America safer by becoming the nation’s best ambassadors and allies. By treating them all as criminals for minor or technical violations, we will be making America less safe and a less desirable place to study. This is contrary to our nation’s values as a welcoming nation of immigrants. Moreover, it is also short-sighted from a national security perspective as the strength of our system of higher education in the US, which is a critical component of our national security efforts, depends in part on the continued flow of foreign students and scholars to our institutions of higher learning.

Proposed regulations does more harm than good. USCIS states that the purpose of the new guidance is to “reduce the number of overstays” and “to improve how USCIS implements the unlawful presence ground of inadmissibility.” Unfortunately, this approach accomplishes neither of these goals and will instead unfairly punish a potentially significant portion of the student and exchange visitor population, further erode foreign student enrollments at U.S. colleges and universities, and unnecessarily damage the U.S. economy.

Recommendation: keep the current, successful policy in place. I urge USCIS to leave in place the current policy, which has served for over 20 years and ensures that fundamental fairness is a critical component in interpreting and implementing the unlawful presence statute.

Thank you for the opportunity to comment and your consideration of these important issues.

Sincerely,



Linda Gentile
Director, Office of International Education
PDSO/RO

June 11, 2018

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of the Director
20 Massachusetts Avenue, NW
Washington, DC 20529-2140

Submitted via email: publicengagementfeedback@uscis.dhs.gov

Re: USCIS Policy Memorandum: Accrual of Unlawful Presence and F, J, and M Nonimmigrants

Dear Madam or Sir:

I am writing to express my opposition and concerns regarding the new policy memorandum, "Accrual of Unlawful Presence and F, J, and M Nonimmigrants," posted by U.S. Citizenship and Immigration Services (USCIS) on May 11, 2018.

Briefly stated, the new memorandum will reverse more than 20 years of USCIS practice regarding the accrual of "unlawful presence," a legal term defined under section 212(a)(9)(B)(ii) of the Immigration and Nationality Act (INA) by reference to an individual who "is present in the United States after expiration of the period of stay authorized by the Attorney General or is present in the United States without being admitted or paroled." For nonimmigrant students and exchange visitors in the F, J, and M categories, legacy Immigration and Naturalization Service (INS) and USCIS have interpreted the statutory unlawful presence provisions to require notice to the individual of a status violation prior to the commencement of the unlawful presence clock. Such notice is provided in the context of the adjudication of a request for an immigration benefit by USCIS or a determination of a status violation by an immigration judge. The USCIS guidance articulating this position states, "It must be emphasized that the accrual of unlawful presence neither begins on the date that a status violation occurs, nor on the day on which removal proceedings are initiated."¹ This longstanding policy provides certainty in determining when unlawful presence begins to accrue, which the new policy does not.

As described in the May 11, 2018 memorandum, USCIS will now deem unlawful presence to have started accruing as of the day after the date that a status violation occurs, thus removing the critical procedural safeguard of providing notice to affected individuals that may find themselves subject to the three- and ten-year bars to admissibility. This raises serious questions regarding

¹ See USCIS Memorandum, Consolidation of Guidance Concerning Unlawful Presence for Purposes of Sections 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I) of the Act," (May 6, 2009), available at <http://www.aila.org/infonet/uscis-consolidation-guidance-unlawful-presence>.

fundamental fairness and due process and will have a significant negative impact on the student, vocational, and exchange visitor communities.

In recognition of the fluidity of academic programs, F, M, and J nonimmigrants are not admitted to the U.S. until a date-certain. Instead, they are admitted for the “duration of their status,” or “D/S,” which means the student or exchange visitor can remain in the United States as long as they maintain their nonimmigrant status. This generally means the student must maintain a full course of study or remain in the exchange program, not engage in unauthorized employment or other unauthorized activities, and complete the academic or exchange program in a timely manner or obtain an extension. What the new memorandum fails to recognize is that the question as to whether an individual has violated their nonimmigrant status is complex and nuanced. Students and exchange visitors can accidentally and unknowingly violate their status by dropping slightly below a full course of study, or by engaging in innocent, but unauthorized activity. For example, F-1 students are permitted to engage in work at a “qualifying on-campus job” for up to 20 hours per week while school is in session. Therefore, an F-1 student who inadvertently exceeds the 20-hour limit by just a couple of hours has technically violated his or her student status. In addition, a Designated School Official may make a good faith error in advising a student by authorizing a reduced course load that should not have been approved, thereby leading the student to unknowingly and unintentionally violate their status. This unfairness is compounded when the status violation also serves as the “trigger” for the accrual of unlawful presence by dependents of students and exchange visitors.

Additional complications are:

It is unclear from the memo whether the trigger for the accrual of unlawful status is the date of the violation or the date that the violation is reported in SEVIS. DSOs are required to report status violations in SEVIS within 21 days of the violation. Without clarification this clarification it seems it will be impossible for a student or exchange visitor to accurately calculate the exact number of days.

The memo appears to state that a student will not accrue time in unlawful presence during the time that an application for reinstatement is pending provided that the application is ultimately approved. Currently these applications are taking over a year to adjudicate. It is unclear whether the student whose application is denied would find him or herself with over a year of accrued unlawful presence. If this is the case then it seems unfair to the student who is told that he/she may legally stay in the US while the application is pending a decision. Under such circumstances it seems that USCIS should fast track I-539 applications for requests for reinstatement of student status so that students are not unduly punished. As mentioned previously, a student may fall out of status for a relatively minor violation or through DSO error. This consequence that will ensue under this proposed change in policy do not seem to fit the circumstances of the average international student seeking a degree at a US institution.

USCIS states that the purpose of the new guidance is to “reduce the number of overstays” and “to improve how USCIS implements the unlawful presence ground of inadmissibility.” Unfortunately, this approach accomplishes neither of these goals and will instead unfairly punish a potentially significant portion of the student and exchange visitor population, further erode

foreign student enrollments at U.S. colleges and universities, and unnecessarily damage the U.S. economy. I urge USCIS to abandon this misguided directive and to maintain the unlawful presence guidance that has been in place for decades and ensures that fundamental fairness is a critical component in interpreting and implementing the unlawful presence statute.

Sincerely,

A handwritten signature in black ink, reading "Sarah Joughin". The signature is written in a cursive, flowing style with a large loop at the end of the last name.

Sarah Joughin
Associate Director
PDSO

8 June 2018

Re: Policy Memo – PM-602-1060 : Accrual of Unlawful Presence and F, J, and M Nonimmigrants

Dear USCIS Chief Officer:

We are a team of Designated School Officials (DSOs) and Alternate Responsible Officers (AROs) who wish to express our concern regarding the recent change of policy guidance (PM-602-1060) announced on May 10, 2018 regarding redefinition of unlawful presence by non-immigrants admitted into the U.S. for Durations of Status (D/S) to take effect on August 9, 2018 and seek your reconsideration of this implementation.

Under this new guidance, an F or J nonimmigrant admitted for duration of status begins to accrue unlawful presence the day after the nonimmigrant no longer pursues the course of study or authorized activity, or the day after he or she engages in an unauthorized activity. Yet by this definition, an F or J nonimmigrant may innocently fail to pursue study or engage in an unauthorized activity without knowledge due to circumstances beyond their control and be unable to complete their actual authorized academic program or course of study due to the extreme 3 year and 10 year bars for such a mistake and incomplete guidance for all relative actors involved in reporting the nonimmigrant's maintenance of status.

For example, an F-1 international student may fail to enroll in or attend classes to meet a full-time course of study as required by 8.CFR.214.2(f) due to outstanding medical reasons; and in such a case neither the student, the school, nor the DSO is able to take proper action to report such an option whereby the student may act or have acted to maintain status, such as in the form of a Medical Reduced Course Load or Leave of Absence permitted by 8.CFR.214.2 (f). In such case that automatic action is taken by SEVIS on the student's record, what guidance is there to prevent incorrect accrual of unlawful presence for the student due to administrative or system error regarding the student's status? Without policy guidance for DSOs and SEVIS, the PM-602-1060 seems to imply that adjudication of a student's unlawful presence is explicitly subject to the reporting of a DSO or action of the SEVIS database even though neither a DSO nor SEVIS have the legal authority to adjudicate unlawful presence in the U.S. Even according to PM-6012-1060 annotation 27, an F, J, or M nonimmigrant begins accruing unlawful presence, due to a failure to maintain his or her status as "may be determined by a DHS officer." The practical application of the new definition for determining unlawful presence does not appear to meet the legal requirements for adjudication of a non-immigrant's status and therefore does not seem acceptable for determining accrual of unlawful presence.

The new guidance in PM-602-1060 also states that unlawful presence is no longer counted from the time a petition of status is denied by a USCIS Officer but rather from the date of failure to pursue course of study or engagement in unauthorized activity. This policy change has stipulated that if an F-1 student,

who due to medical circumstances beyond their control, applies for re-instatement of status as afforded by 8.CFR.214.2(f) and is denied has now been accruing unlawful presence for the duration of the pending Re-instatement application. Currently, processing times by USCIS for these petitions are taking several months to a year or longer in order to be adjudicated. Therefore, what guidance is provided to a student who takes action to maintain status according to 8.CFR.214.2(f) but accrues extended unlawful presence due to processing negligence by USCIS itself? In this situation, the policy guidance of PM-602-1060 appears to negate the viability of Re-instatement as afforded by the code of federal regulations, and it is questioned whether USCIS policy has this legal precedence. In addition, for an F-1 international student petitioning Re-instatement, who for all definitions of intent as a bona fide student is pursuing the necessary actions to maintain that intent for his or her lawful presence in the U.S., this policy guidance seems to provide excessive hardship and unnecessary discrimination against the F-1's bona fide student intent due to circumstances beyond the F-1's control.

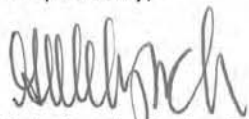
The above points have been exemplified by a situation of medical circumstances for an F-1 student but can be further exemplified for F-1 or J-1 non-immigrants and their dependents in countless other situations including but not limited to: employment activities, transfers between academic institutions, change of status petitions, employment petitions, change of academic program objectives, and engaging in modern forms of academic activities not well-defined in the code of federal regulations such as online or study away educational activities.

F-1 and J-1 nonimmigrants provide unparalleled value to the U.S. economy, U.S. government activities and relations, and the American education system in infinite positive ways. We strongly urge you to consider the impact of the change of policy guidance in PM-602-1060 that it will have not just on international students and exchange visitors or their families and home countries, but on the average American who benefits from F and J nonimmigrant tax dollars, education service careers and jobs, cultural enlightenment and heritage, in addition to social engagement afforded through the international exchange environment.

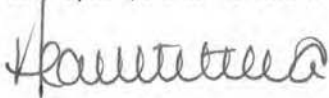
It is understood that the 3 and 10-year bars imposed by length of unlawful presence were designed to prevent status overstay and thereby reduce undocumented individuals in the U.S. However, because of the desire and need for many international students and exchange visitors to complete their academic objectives in the U.S. when they are here, we are strongly concerned that the new policy guidance will provide undue hardship on these nonimmigrants and possibly compel more, not less, of them to remain in the U.S. past their status in order to complete the academic objectives before becoming subject to the bars. This runs the risk of only more undocumented individuals in the U.S., negatively affecting not only the international student or exchange visitor who chooses to become undocumented but also school officials and academic institutions, the U.S. economy, U.S. government activities and relations, and the American education system in infinite negative ways. The according detrimental loss that will occur to the average American due the disadvantage of undocumented nonimmigrants can also not be overstated.

The prior policy guidance to unlawful presence provided on May 6, 2009 in Chapter 40.9 Section 212(a)(9) of the Act - Aliens Unlawfully Present after Previous Immigration Violations, which has been seen as successful policy guidance for nearly the past decade, did not have the incongruence of the new policy outlined in PM-602-160. In respect of the old adage, *if ain't broke, don't fix it*, and in due concern as detailed in this letter, we sincerely seek your reconsideration of implementation of the new policy guidance and recommend continued use of the prior guidance provided on May 6, 2009.

Respectfully,



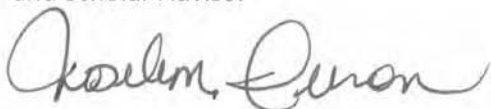
Gale Lynch, Senior Director



Heather Hena, Applications Manager



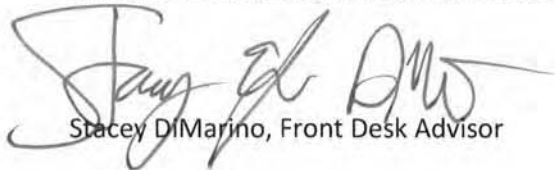
Bengisu Peker, Senior International Student
and Scholar Advisor



Joselyn Duran, Assistant Applications Manager



Kristen Gartside, International Student Advisor



Stacey DiMarino, Front Desk Advisor



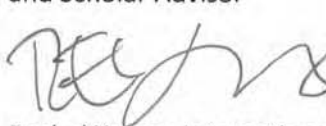
Alexandra Chow, Associate Director



Crystal Tapia, Systems Manager



Lindsay Wersebe, Senior International Student
and Scholar Advisor



Rachel Young, International Student Advisor



Andrew Amadei, International Student Advisor

June 8, 2018

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of the Director
20 Massachusetts Avenue, NW
Washington, DC 20529-2140

Submitted via email: publicengagementfeedback@uscis.dhs.gov

Re: USCIS Policy Memorandum: Accrual of Unlawful Presence and F, J, and M Nonimmigrants

Dear Director Cissna:

I am writing to express my opposition and concerns regarding the new policy memorandum, "Accrual of Unlawful Presence and F, J, and M Nonimmigrants," posted by U.S. Citizenship and Immigration Services (USCIS) on May 11, 2018.

As a professional in the field of international education, I work with thousands of international students who come to the U.S. to pursue higher education. Along with a staff team of dedicated professionals, we assist students in navigating the complex U.S. immigration system and in maintaining status in order to focus on their primary goal – obtaining an excellent education and furthering their personal and career objectives.

The new USCIS practice memo causes many concerns. On a large scale, this is another policy that will make the United States less attractive to talented international students and scholars. Briefly stated, it will reverse more than 20 years of USCIS practice regarding the accrual of "unlawful presence," a legal term defined under section 212(a)(9)(B)(ii) of the Immigration and Nationality Act (INA) by reference to an individual who "is present in the United States after expiration of the period of stay authorized by the Attorney General or is present in the United States without being admitted or paroled." For nonimmigrant students and exchange visitors in the F, J, and M categories, legacy Immigration and Naturalization Service (INS) and USCIS have interpreted the statutory unlawful presence provisions to require notice to the individual of a status violation prior to the commencement of the unlawful presence clock. Such notice is provided in the context of the adjudication of a request for an immigration benefit by USCIS or a determination of a status violation by an immigration judge. The USCIS guidance articulating this position states, "It must be emphasized that the accrual of unlawful presence neither begins on the date that a status violation occurs, nor on the day on which removal proceedings are

University of Southern California • [REDACTED], Los Angeles, California [REDACTED] • Tel: [REDACTED]



initiated.” This longstanding policy provides certainty in determining when unlawful presence begins to accrue, which the new policy does not.

As described in the May 11, 2018 memorandum, USCIS will now deem unlawful presence to have started accruing as of the day after the date that a status violation occurs, thus removing the critical procedural safeguard of providing notice to affected individuals that may find themselves subject to the three- and ten-year bars to admissibility. This raises serious questions regarding fundamental fairness and due process and will have a significant negative impact on the student, vocational, and exchange visitor communities.

International students already study in the U.S. under a regulatory framework that makes their experience quite different from that of domestic students. Employment limitations, difficult visa application procedures, and other constraints are accepted by students as a price to accessing incredible education opportunities in the U.S. However, creating a situation in which individuals must worry that even unintentional errors that impact one’s status can have devastating effects on their educational progress seems to be inappropriate and unfair. In our role as Designated School Officials (DSOs), my staff help students who have fallen out of status with reinstatement applications. While most are eventually approved, there have been instances where an individual received a denial of their reinstatement request. Under current policy and practice, these individuals are then able to take appropriate actions, including potentially leaving the U.S., in order to comply with DHS/USCIS decisions on their case. In many cases the appropriate actions taken by the individual help to preserve future opportunities to pursue education and/or employment in the U.S. The new policy will, in many cases, make it impossible for an impacted person to take appropriate actions in a timely manner. This situation is damaging to not only the individual’s personal situation, but also U.S. higher education more broadly, as we seek to attract and retain the most talented students from around the world.

Thank you for the opportunity to comment.

Sincerely,

A handwritten signature in black ink, appearing to read "Tony Tambascia", with a stylized flourish at the end.

Tony Tambascia
Executive Director, Office of International Services
University of Southern California



AMERICAN
IMMIGRATION
LAWYERS
ASSOCIATION



June 11, 2018

Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of the Director
20 Massachusetts Avenue, NW
Washington, DC 20529-2140

Submitted via email: publicengagementfeedback@uscis.dhs.gov

Re: USCIS Policy Memorandum: Accrual of Unlawful Presence and F, J, and M Nonimmigrants

Dear Madam or Sir:

The American Immigration Lawyers Association (AILA) and the American Immigration Council (Immigration Council) respectfully submit the following comments in response to the USCIS Memorandum, “Accrual of Unlawful Presence and F, J, and M Nonimmigrants,” posted on the USCIS website on May 11, 2017.¹

Established in 1946, AILA is a voluntary bar association of more than 15,000 attorneys and law professors practicing, researching and teaching in the field of immigration and nationality law. Our mission includes the advancement of the law pertaining to immigration and nationality and the facilitation of justice in the field. AILA members regularly advise and represent businesses, U.S. citizens, U.S. lawful permanent residents, and foreign nationals regarding the application and interpretation of U.S. immigration laws.

The American Immigration Council is a non-profit organization established to increase public understanding of immigration law and policy, advocate for the fair and just administration of our immigration laws, protect the legal rights of noncitizens, and educate the public about the enduring contributions of America’s immigrants. In addition, through its work on the economic benefits of immigration reform, the Immigration Council has helped to establish baseline standards for understanding the important role immigration plays in shaping and driving a twenty-first century American economy.

A. Background and Overview of Historical Interpretation of Unlawful Presence

“Unlawful presence” is a legal term defined under section 212(a)(9)(B)(ii) of the Immigration and Nationality Act (INA). The term refers to an individual who “is present in the United States after expiration of the period of stay authorized by the Attorney General or is present in the United States without being admitted or paroled.” Under INA §212(a)(9)(B), a person who has been unlawfully

¹ PM 602-1060, “Accrual of Unlawful Presence and F, J, and M Nonimmigrants,” (May 10, 2018) *available at* https://www.uscis.gov/sites/default/files/USCIS/Outreach/Draft%20Memorandum%20for%20Comment/AccrualofUnlawfulPresenceFJMNonimmigrantsMEMO_v2.pdf

present for more than 180 days but less than one year and who departs the United States is barred from returning for three years. A person who departs after having been unlawfully present for more than one year is barred for ten years. Created by Congress with the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), the unlawful presence provisions took effect on April 1, 1997.²

In recognition of the fluidity of academic programs, F, M, and J nonimmigrants are not admitted to the U.S. until a date-certain. Instead, they are admitted for “duration of status,” or “D/S,” which means the student or exchange visitor can remain in the United States as long as he or she maintains nonimmigrant status. This generally means the individual must maintain a full course of study or remain in the exchange program, not engage in unauthorized employment or other unauthorized activities, and complete the academic or exchange program in a timely manner or obtain an extension.

Because international students are not admitted until a date-certain, legacy Immigration and Naturalization Service (INS) and USCIS have interpreted the statutory unlawful presence provisions to require notice of a status violation to individuals admitted for “D/S” before the unlawful presence clock will start. Such notice is provided in the context of the adjudication of a request for an immigration benefit by USCIS or a determination of a status violation by an immigration judge. Beginning in 1997, this interpretation was commemorated in a series of USCIS guidance documents and was most recently reiterated in the May 6, 2009 “Consolidation of Guidance Concerning Unlawful Presence for Purposes of Sections 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I) of the Act.”³ The 2009 guidance emphasizes that “the accrual of unlawful presence neither begins on the date that a status violation occurs, nor on the day on which removal proceedings are initiated.”⁴ Further, Chapter 40.9.2(a)(2) of the Adjudicator’s Field Manual (AFM) makes it clear that “to understand the operation of sections 212(a)(9)(B) and 212(a)(9)(C)(i)(I) of the Act, it is important to comprehend the difference between being in an unlawful immigration status and the accrual of unlawful presence.... Although these concepts are related ... they are not the same.”

B. Summary of USCIS’s New Interpretation of Unlawful Presence

As described in the May 11, 2018 memorandum (hereinafter “2018 memorandum” or “memo”), USCIS will now deem unlawful presence to have started accruing for F, M, and J nonimmigrants as of the day after the date that a status violation occurs, thus removing the critical procedural safeguard of providing notice to affected individuals that may find themselves subject to the three- and ten-year bars to admissibility. For status violations found to have occurred on or before August 9, 2018, the effective date of the memo, unlawful presence will be calculated beginning August 10, 2018, if not accrued earlier.

When assessing whether a status violation has occurred, the memo states that adjudicators are to consider: (1) information contained in systems available to USCIS; (2) information contained in the individual’s “A file;” and (3) information obtained through a Request for Evidence (RFE) or Notice of Intent to Deny (NOID). Moreover, the memo states that while the status of the spouse and children of an F, J, or M nonimmigrant is contingent on the status of the principal nonimmigrant, the period of stay authorized for a dependent spouse or child may also end due to their own conduct or circumstances.

² Div. C of Pub. Law No. 104-208 (Sept. 30, 1996).

³ See <http://www.aila.org/infonet/uscis-consolidation-guidance-unlawful-presence>.

⁴ *Id.* at 25.

After more than 20 years of consistent interpretation that recognizes the principle of fundamental fairness and provides certainty in determining when unlawful presence begins to accrue, USCIS is abruptly changing course and conflating the two distinct legal concepts of “status violation” and “unlawful presence.” There is no doubt that this new approach to interpreting unlawful presence will have a significant negative impact on the student, vocational, and exchange visitor communities, and will further erode foreign student enrollments in U.S. colleges and universities. Moreover, for the reasons described below, we submit that the 2018 memorandum is an unlawful interpretation of the statutory unlawful presence provisions and cannot stand.

C. The 2018 Memorandum Conflicts with the Unlawful Presence Statute, which is Clear on its Face

The 2018 memorandum conflicts with the unambiguous language of the INA. In 1996, Congress created the new concept of unlawful presence, clearly stating that a person is “unlawfully present” if he or she “is present in the United States after the expiration of the period of stay authorized by the Attorney General or is present in the United States without being admitted or paroled.”⁵ Thus, equating unlawful presence with a status violation is contrary to Congress’ clearly expressed intent. Moreover, principles of statutory construction confirm that Congress never intended such an interpretation, as the new unlawful presence provisions were incorporated into the INA without any modification to the numerous provisions that penalize a person for a “status violation” or “failure to maintain status.” For example:

- **INA §212(a)(6)(G):** Renders a noncitizen who “violates a term or condition” of an F-1 student visa inadmissible until the noncitizen has been outside of the United States for a continuous period of five years after the violation.
- **INA §237(a)(1)(C)(i):** Renders a noncitizen deportable if he or she has “failed to maintain the nonimmigrant status in which [he or she] was admitted ... or to comply with the conditions of any such status.”
- **INA §245(c)(2):** Renders a noncitizen ineligible for §245 adjustment of status if the noncitizen engages in unauthorized employment, “is in unlawful immigration status,” or “has failed ... to maintain continuously a lawful status since entry into the United States.”
- **INA §245(c)(7):** Renders a noncitizen ineligible for §203(b) adjustment of status who is “not in a lawful nonimmigrant status.”
- **INA §245(c)(8):** Renders a noncitizen ineligible for §245 adjustment of status who “has otherwise violated the terms of a nonimmigrant visa.”
- **INA §245(k):** Includes, as part of its eligibility requirements, that an individual not “fail[] to maintain, continuously, a lawful status.”

Other statutory provisions confirm that Congress intended the two concepts to remain distinct. For example, adjustment of status under INA §245A(a)(2) requires: (1) entry before January 1, 1982; (2) continuous residence in unlawful status since such date; and (3) that the period of authorized stay expired before January 1, 1982, or that the government knew of the unlawful status. The third prong makes it clear that expiration of a period of authorized stay and “unlawful status” of which the

⁵ INA §212(a)(9)(B)(ii).

government is aware are different concepts. Otherwise, adopting an interpretation in line with the 2018 memorandum, individuals who violated the terms of their status would automatically be deemed outside the “period of authorized stay” and the purposeful distinction noted in prong (3) would be irrelevant.⁶

In addition, the unlawful presence statute itself distinguishes between “unlawful presence” and “status” in INA §212(a)(9)(B)(iv)(II). That section states that the accrual of unlawful presence is tolled for an individual who “has filed a nonfrivolous application for a change or extension of *status* before the date of expiration of the period of stay authorized by the Attorney General” (Emphasis added). By using the terms “status” and “unlawful presence” in this way, Congress evinced that these are separate legal concepts with distinct legal consequences.

As explained by the Supreme Court, “it is a normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning.”⁷ “A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant.”⁸ Any interpretation of “unlawful presence” or “expiration of the period of authorized stay” that is conflated with a “status violation” or “failure to maintain status” would render sections of the INA superfluous.

When it intends to penalize a failure to maintain status or status violation, Congress has made that intention clear by the plain language of the statute. Section 212(a)(9)(B) of the INA makes no reference to these terms or concepts. Where “one interpretation of a statute or regulation obviously could have been conveyed more clearly with different phrasing, the fact that the authors eschewed that phrasing suggests ... that they in fact intended a different interpretation.”⁹ Therefore, the 2018 memorandum, which folds the concept of a status violation into the definition of unlawful presence, is contrary to the plain language of the statute and the unambiguous intention of Congress in its adoption of INA §212(a)(9)(B).

D. Assuming without Conceding that the Statute is Ambiguous, the Memorandum Is Not Entitled to Deference

Because there is no ambiguity in the statute, the law is applied as written and the 2018 memorandum receives no deference under *Chevron, U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*¹⁰ Assuming only for argument’s sake that an ambiguity exists, the guidance – which was not issued through the formal rulemaking process – would at most be afforded deference under *Skidmore v. Swift & Co.* but here too, that fails.¹¹ Deference under *Skidmore* depends on “the thoroughness evident in [the agency’s] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.”¹² Based on flawed and inconsistent reasoning, the 2018 memorandum reverses the agency’s long-standing interpretation of unlawful presence without adequate justification, is not designed to achieve its stated goals, and cannot stand.

⁶ See also 8 USC §1365(b)(2), which similarly distinguishes between the expiration of a period of authorized stay and unlawful status known to the government.

⁷ *Taniguchi v. Kan Pacific Saipan, Ltd.*, 566 U.S. 560, 571 (2012) (internal citations omitted).

⁸ *Corley v. United States*, 556 U.S. 303, 314 (2009) (internal citations omitted).

⁹ *Gerbier v. Holmes*, 280 F.3d 297, 309 (3d Cir. 2002) (quoting *United States v. Ibarra-Galindo*, 206 F.3d 1337, 1339 (9th Cir. 2000) (overruled on other grounds)).

¹⁰ 467 U.S. 837, 842-43 (1984).

¹¹ 323 U.S. 134, 140 (1944).

¹² *Id.* at 140.

Skidmore instructs us to consider the agency’s “consistency with earlier and later pronouncements.” As noted above, the 2018 memorandum represents a significant departure from more than 20 years of a single, unified approach to unlawful presence for F, J, and M nonimmigrants. In evaluating “the thoroughness evident in [the agency’s] consideration [and] the validity of its reasoning,” we address each of the points USCIS makes to justify the change in unlawful presence interpretation.

First, USCIS states that “the former INS policy, as consolidated in the AFM, went into effect in 1997, prior to the creation of some of the technologies and systems currently used by DHS to monitor nonimmigrants ... in F, J, or M status.”¹³ More specifically, it notes that “since the creation of the policy, the Student and Exchange Visitor Information System (SEVIS) ... has provided USCIS officers additional information on an alien’s immigration history.”¹⁴ However, SEVIS went into effect in 2003. Although this was six years after INA §212(a)(9)(B) took effect in 1997, it was also six years *before* the 2009 consolidated guidance reaffirmed USCIS’s long-standing interpretation of unlawful presence. Moreover, as acknowledged by SEVIS itself, the accuracy and integrity of SEVIS data is flawed,¹⁵ and “[i]naccurate data can affect the status of the student’s SEVIS record and put the student’s eligibility for benefits at risk.”¹⁶

Second, USCIS claims that the purpose of the new policy is to “reduce the number of overstays.”¹⁷ However, this is not borne out by the policy itself, which provides no instructions or guidance on preventing overstays, such as notifying students and exchange visitors in advance of the end of their program. Instead, the memorandum introduces a “gotcha” approach, instructing adjudicators to search records for perceived status violations and retroactively calculate periods of unlawful presence without notice. Far from reducing the number of overstays, the memorandum expands the very definition of what constitutes an overstay – something the agency has no legal authority to do. The approach to unlawful presence described in the memo does nothing to advance this stated purpose.

In support of this stated goal, USCIS cites the DHS Fiscal Year 2016 Entry/Exit Overstay Report,¹⁸ which notes that for FY 2016, “the estimated overstay rate was 6.19 percent for F nonimmigrants, 3.80 percent for J nonimmigrants, and 11.60 percent for M nonimmigrants.”¹⁹ However, the figures cited by USCIS include “out-of-country” overstays, or individuals whose departure was recorded after their lawful period of admission expired. This could easily encompass individuals who stayed just a few days longer than the conclusion of their program to tie up their personal affairs and is not a true representation of the “overstay” population with which the administration is concerned. The “suspected in-country” overstay rate (individuals for whom no departure has been recorded) is in fact much lower than the figures cited by USCIS: 2.99 percent for F nonimmigrants, 2.94 percent for M nonimmigrants, and 2.42 percent for J nonimmigrants. In addition, as noted in the Executive Summary, determining lawful status is not a straightforward analysis:

¹³ PM-602-1060 at 2.

¹⁴ *Id.*

¹⁵ See <https://www.ice.gov/sevis/data-integrity>.

¹⁶ <https://studyinthestates.dhs.gov/2016/06/maintaining-accurate-sevis-records-when-to-request-a-correction-or-data-fix>

¹⁷ PM-602-1060 at 2.

¹⁸ See

<https://www.dhs.gov/sites/default/files/publications/Entry%20and%20Exit%20Overstay%20Report%2C%20Fiscal%20Year%202016.pdf>

¹⁹ PM-602-1060 at 2.

... [D]etermining lawful status is more complicated than solely matching entry and exit data. For example, a person may receive from CBP a six-month admission upon entry, and then he or she may subsequently receive from U.S. Citizenship and Immigration Services (USCIS) a six-month extension. **Identifying extensions, changes, or adjustments of status is necessary to determine whether a person is truly an overstay.**

In addition:

Valid periods of admission to the United States vary; therefore, **it was necessary to establish “cutoff dates” for the purposes of a written report.** Unless otherwise noted, the tables accompanying this report refer to departures that were expected to occur between October 1, 2015 and September 30, 2016....²⁰

In other words, due to limitations associated with producing a written report, DHS acknowledges that the “overstay” data in the report includes some individuals who were later granted permission to remain beyond their initial period of authorized stay. The fact that this data was inflated is confirmed by the fact that four months after the “cutoff dates,” the number of overstays substantially decreased:

Due to continuing departures and adjustments in status by individuals in this population, by January 10, 2017, the number of Suspected In-Country Overstays for FY 2016 decreased to 544,676, rendering the Suspected In-Country Overstay rate as 1.07 percent. **In other words, as of January 10, 2017, DHS has been able to confirm the departures or adjustment in status of more than 98.90 percent of nonimmigrant visitors scheduled to depart in FY 2016 via air and sea POEs, and that number continues to grow.**²¹

The report also concedes to other factors limiting its accuracy, such as its reliance on information from the Arrival and Departure Information System (ADIS). ADIS has limited capacity to record exits and entries made via land and makes no distinction of those who overstay one day versus one year or longer.²² Yet this is a significant difference, as a one-day overstay may be the result of a person missing their flight or sustaining an injury that renders them unable to travel.

Lastly, USCIS states that the new memo will “improve” how USCIS implements the unlawful presence ground of inadmissibility but fails to offer any reason or explanation as to how the new memo will accomplish that. In sum, USCIS has clearly failed to thoroughly consider the implications of its new unlawful presence interpretation, failed to adequately justify a need for the change, and has cited no concrete authorities to support its stated goals. The memorandum cannot stand under *Skidmore* deference.

E. The Memorandum Is a Legislative Rule that Requires Notice and Comment Rulemaking under the Administrative Procedure Act (APA)

The Administrative Procedure Act (APA) recognizes two types of administrative rules: legislative rules issued through formal notice and comment rulemaking, which are given the full force and effect of law, and interpretive rules designed to advise the public of agency interpretation of a legal rule. Interpretive rules do not require notice and comment and lack the force of law.²³ While the 2018

²⁰ *Id.* (emphasis added).

²¹ *Id.* (emphasis added).

²² *Id.*

²³ See *Perez v. Mortg. Bankers Ass’n*, 135 S. Ct. 1199, 1200-01 (2015).

memorandum purports to merely advise the public of how the term “unlawful presence” is to be interpreted, that conclusion is neither factually correct nor legally supported.

As noted above, over the course of two decades, USCIS has stood by its 1997 interpretation of unlawful presence, reiterating it most recently in 2009 when it undertook a comprehensive review of its various memoranda and case law on unlawful presence and issued consolidated guidance that ultimately became chapter 40.9.2 of the AFM. While we maintain that the 2018 memorandum, which erases the distinction between the concepts of “unlawful presence” and “violation of status” is unlawful, the APA requires USCIS to give the public advance notice and an opportunity to comment through formal rulemaking before attempting to impose what constitutes a change in how the law will be applied in the future.

While the courts have not developed a unified approach to evaluating whether a rule is legislative or interpretive, the reasoning of various decisions is instructive. Employing textual analysis, the Ninth Circuit has held that legislative rules “are those which effect a change in existing law or policy.”²⁴ Another critical characteristic of legislative rules is that they have general application.²⁵ Conversely, “interpretive rules are those which merely clarify or explain existing law or regulations.”²⁶ While a legislative rule is a broad wholesale change in interpretation and application of law, interpretive rules are used more for “discretionary fine-tuning than for general law-making.”²⁷ For example, in *Jean v. Nelson*, the Eleventh Circuit considered whether a blanket change in how INS treated arriving aliens [detention (new) vs. parole (old)] was a legislative or interpretive rule.²⁸ The court found that even though parole was still a discretionary option, the rule was legislative because it had general applicability, and did more than just clarify or explain an existing rule.²⁹ Because the rule created an entirely new procedure for all cases, notice and comment rulemaking was required.³⁰ Similar analytical approaches are found in *N.H. Hosp. Ass’n v. Azar*,³¹ and *Dia Navigation Corp. Ltd. v. Pomeroy*.³²

Applying this analysis, the 2018 memorandum is a legislative rule because it changes the manner in which unlawful presence is determined for all F, J, and M nonimmigrants who have been admitted “D/S” and is therefore of general applicability. It will result in future enforcement actions against persons under facts and circumstances that did not previously result in enforcement actions, thus doing far more than merely “explaining” an existing policy. Finally, it is a 180-degree change in the manner in which USCIS treats persons admitted for the duration of their status by conflating the fact (or even potential fact) of a status violation with the beginning of a period of unlawful presence.

F. USCIS Has Failed to Articulate a Satisfactory Explanation for its New Approach to Unlawful Presence as Required by *Encino Motorcars*

In *Encino Motorcars, LLC v. Navarro*, the U.S. Supreme Court reaffirmed several longstanding rules of administrative rulemaking, including the basic procedural tenet that agencies must give adequate

²⁴ *Alcaraz v. Block*, 746 F.2d 593, 613 (9th Cir. 1984).

²⁵ *Flagstaff Med. Ctr. v. Sullivan*, 962 F.2d 879, 886 (9th Cir. 1992).

²⁶ *Alcaraz*, 746 F.3d at 613; *Hector v. USDA*, 82 F.3d 165, 170-71 (7th Cir. 1996).

²⁷ *Alcaraz*, *Id.* at 613.

²⁸ 711 F.2d 1455 (11th Cir. 1983), *vacated in part as moot*, 727 F.2d 957 (11th Cir. 1984) (new regulations issued).

²⁹ 711 F.2d at 1476, 1478.

³⁰ *Id.* at 1478.

³¹ 887 F.3d 62, 72-73 (1st Cir. 2018).

³² 34 F.3d 1255 (3d Cir. 1994).

reasons for their decisions.³³ Citing *Motor Vehicle Mfrs. Assn. of United States v. State Farm Mut. Automobile Ins. Co. (MVMA)*, the Court stated that an agency “must examine the relevant data and articulate a satisfactory explanation for its actions including a rational connection between the facts found and the choice made.”³⁴ That requirement is satisfied when the agency’s explanation is clear enough that its “path may reasonably be discerned.”³⁵ In explaining its changed position, an agency must also be cognizant that longstanding policies may have engendered serious reliance interests that must be taken into account.³⁶ When an agency fails to provide even that level of minimal analysis, its actions are arbitrary and capricious and cannot carry the force of law.³⁷

As described in Part D, *supra*, and Part G, *infra*, the change in unlawful presence interpretation articulated in the 2018 memorandum is not supported by a reasoned explanation, eliminates a critical notice element, and fails to take into consideration fundamental fairness and due process requirements, as well as the reliance interests of the regulated public that have built up over the past two decades. For all of these reasons, the 2018 memorandum is an arbitrary and capricious change in interpretation that cannot stand.

G. The 2018 Memorandum Raises Significant Due Process and Fundamental Fairness Concerns and is Constitutionally Suspect

Unlike foreign nationals who are admitted until a “date certain,” and will trigger unlawful presence if they remain in the U.S. beyond the date recorded on Form I-94 (or recorded in CBP electronic systems), plus any extension thereafter granted, students and exchange visitors that are admitted for “D/S” lack the benefit of such a bright-line test. As a result, legacy INS and USCIS created a different bright-line standard, one that incorporates the principle of fundamental fairness: formal notification by USCIS or an immigration judge that a status violation occurred before the unlawful presence clock can start. The exceedingly harsh penalties associated with unlawful presence, and the clear distinctions Congress created between the concepts of unlawful presence and status violation, have informed more than 20 years of policy, which ascribes caution to calculating unlawful presence.

The new memorandum throws caution to the wind. The government’s new interpretation of unlawful presence raises serious due process concerns and is unfair and unworkable in its application. Since 1997, the Service has interpreted INA §212(a)(9)(B) as requiring some form of notice to individuals for unlawful presence to accrue. Under the 2018 memorandum, while the government’s finding that an F, M, or J nonimmigrant has violated status would still typically occur in the course of a USCIS benefits adjudication, the date on which unlawful presence will accrue is imposed retroactively. The 2018 memorandum instructs adjudicators to consider information in the systems available to USCIS, in the alien’s record, and alien’s admissions regarding his or her immigration history or other information discovered during the adjudication,” but provides no limitation as to how far back adjudicators may reach, such that a student or exchange visitor may abruptly learn that he or she has been unlawfully present for several years.³⁸ Moreover, the memo states that “an F-2, J-2, or M-2 nonimmigrant’s period of stay authorized ends when the F-1, J-1, or M-1 nonimmigrant’s period of stay authorized ends.” This means that a spouse may find out only many years after the fact that they too accrued unlawful presence.³⁹

³³ 136 S. Ct. 2117, 2125 (2016).

³⁴ 463 U.S. 29, 43 (1983).

³⁵ *Bowman Transp., Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 286 (1974).

³⁶ *Encino Motorcars*, 136 S. Ct. at 2126; *Perez*, 135 S. Ct. at 1209.

³⁷ See 5 U.S.C. § 706(2)(A); *MVMA*, 463 U.S. at 42-43.

³⁸ PM-602-1060 at 4 n.12.

³⁹ *Id.* at 5.

The regulation at 8 CFR §214.2(f)(5)-(6) articulates the circumstances in which an F-1 student is deemed to be “out of status.” F-1 students who work without authorization, who are deemed to not be pursuing a full course of study, who transfer to another school without permission, and who fail to complete a full course of study are deemed to be “out of status.” However, F-1 students are subject to additional reporting requirements that may constitute a status violation if not completed timely. These reporting requirements include: reporting biographical information to a Designated School Official (DSO) every six months during a STEM OPT extension;⁴⁰ and completing an annual self-evaluation report that is signed by the employer and submitted to the DSO within 1 year and 10 days of the validity period on the Employment Authorization Document, as well as a final evaluation within 10 days of the conclusion of the 24-month period of STEM OPT.⁴¹ Additionally, employers of STEM OPT students are required to report absences to the DSO; and any material change in a STEM OPT training plan must be reported to the DSO by the student after having the employer sign a new training plan.⁴² USCIS has not articulated whether the failure to undertake any of these actions would trigger the accrual of unlawful presence. The 2018 memorandum makes no distinction between minor technical violations (e.g. reporting a change in employment a few days late) versus a major violation (dropping all classes without authorization).

In practice, this policy will create a large class of inadmissible aliens who have received no notice of their unlawful presence because in many cases, F, M, and J nonimmigrants have no knowledge that a status violation has even occurred. In addition, a significant number of individuals will only become aware of a status violation when it is too late to correct course and they find themselves subject to a three- or ten-year bar to admissibility. Under the new memo, accidental and inadvertent status violations will subject unsuspecting individuals who have not acted in bad faith to extreme penalties. Examples of situations where students or exchange visitors may be found to have inadvertently violated their status include:

1. **Inadvertently Engaging in Unauthorized Employment.** While 8 CFR §214.2(f)(9) clearly states that a student may work on campus for up to 20 hours per week and requires authorization in the form of curricular or optional practical training to work off-campus in certain circumstances, there is no clear guidance on what constitutes “employment.” A student may believe that off-campus volunteer work is not unauthorized “employment” even though it is possible that the Service could view it as such, particularly if it involves activities that normally would be compensated. Other activities that are not clearly defined include working for and being paid by an overseas entity while physically present in the U.S.; selling something on eBay; selling personally created art work or photography; getting paid for publication of one’s dissertation; getting paid to host a seminar or speak at an academic conference or event; getting paid a royalty for activities associated with research, etc.
2. **Practical Training Issues.** Issues may also arise when a student on OPT drops below 20 hours of work one week, starts a degree program while on OPT, or works just a few days or one week beyond CPT.
3. **Inadvertently Violating Status by Following the Advice of a School or Designated School Official (DSO).** A school may err in advising a student, leading to an accidental status violation through no fault of the student. For example, a school may incorrectly advise a student as to the number of hours that he or she may work on campus, or incorrectly advise

⁴⁰ 8 CFR §214.2(f)(12).

⁴¹ 8 CFR §214.2(f)(10)(ii)(C)(9)(i).

⁴² 8 CFR §214.2(f)(10)(ii)(C)(6); and 8 CFR §214.2(f)(10)(ii)(C)(9)(ii).

a student to drop a class that causes the student to fall below a full course of study. A DSO may grant a reduced course load authorization in good faith, but SEVP or USCIS may later determine this authorization should not have been granted. Further, a program administrator may send a J-1 student physician to a training location that has not been approved or may improperly advise a student physician that he or she may moonlight doing non-GME work within the same training hospital.

4. **Extraordinary Circumstances Beyond One's Control.** Extraordinary circumstances can also cause a student or exchange visitor to unintentionally violate status. For example, in May 2018, an F-1 student on OPT was walking down the sidewalk in Denver when a car hit him and pinned him to a tree. His leg had to be amputated.⁴³ Under 8 CFR §214.2(f)(10)(ii)(E), he will be out of status as soon as he is unemployed for 90 days. If he is hospitalized for more than 180 days after the effective date of the new policy and after he falls out of status through no fault of his own, he will be subject to the three-year bar when he departs. Additionally, USCIS has never issued clear guidelines on maintaining status when on maternity leave.
5. **Dependents May Be Unlawfully Present Without Knowing It.** Since the status of dependents of F-1, J-1 and M-1 nonimmigrants depends upon the principal nonimmigrant maintaining his or her status, those family members (with the exception of children under the age of 18, who are statutorily exempt from accruing unlawful presence) would be out of status and unlawfully present upon a violation of the principal's status. Thus, a spouse who is unaware of a principal's status violation would become subject to serious immigration penalties without even knowing it. This could occur, for example, when the principal tries to hide his or her failure at school from an unknowing spouse or in an abusive situation.

By collapsing the distinction between “unlawful presence” and “status violation” and deeming unlawful presence to accrue retroactively, the 2018 memorandum removes the important procedural safeguard of notice to individuals that they may be deprived of a liberty interest. This lack of notice raises due process concerns. The Fifth Amendment's due process clause is a core concept in the Bill of Rights and requires all levels of American government to operate within the law, using procedures that are fundamentally fair. The core elements of due process are notice and a hearing before an impartial tribunal, which “minimize substantively unfair or mistaken deprivations” by providing individuals an opportunity to contest the basis on which the government seeks to deprive them of protected interests.⁴⁴ “An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.”⁴⁵

The three- and ten-year bars to admissibility represent a deprivation of liberty, as subject individuals are barred from returning to the United States for a lengthy period of time. In *Kent v. Dulles*, the Supreme Court held that the right to travel is a “liberty” interest protected by the Fifth Amendment and that where governmental restrictions on travel are involved, the Court will construe narrowly all delegated powers that curtail or dilute them.⁴⁶ Moreover, the constitutional guarantee of due process is not limited to U.S. citizens but applies equally to all “persons” present in the United States, regardless of alienage or immigration status.⁴⁷

⁴³ <http://kdvr.com/2018/05/03/25-year-old-man-sedated-and-on-ventilator-following-crash-in-lone-tree/>

⁴⁴ *Fuentes v. Shevin*, 407 U.S. 67, 81 (1972).

⁴⁵ *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

⁴⁶ 357 U.S. 116 (1958).

⁴⁷ *Plyler v. Doe*, 457 U.S. 202 (1982).

The Supreme Court has held that in applying the Fifth Amendment's due process guarantee, one must balance the private interests of affected individuals with the government's interest. In *Mathews v. Eldridge*, the Court indicated that the identification of the specific dictates of due process generally requires consideration of three distinct factors:

[F]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and, finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.⁴⁸

Applying the *Eldridge* test to the aforementioned examples of cases where students may inadvertently violate their status illustrates the problems inherent in the new interpretation of unlawful presence. Take, for example, a student who inadvertently violates F-1 status by engaging in activities later deemed to have constituted unauthorized "employment." First, the student has a private interest that will be affected by the application of the new policy to his case, given that he will likely have accrued sufficient unlawful presence at the time the determination is made to trigger a three- or ten-year bar upon departure from the United States. Second, the lack of legal guidance on what constitutes "employment" creates a significant likelihood of an erroneous deprivation, and the additional procedural safeguards, which previously existed in the form of notice before deeming the accrual of unlawful presence to have commenced, no longer exist. Third, although the government may have a compelling interest in enforcing the immigration laws and in implementing policies to minimize overstay, the policy at issue in this case does nothing to further that interest. As outlined above, the 2018 memorandum will severely penalize individuals for status violations that were unintentional and of which they were likely unaware until it is too late. It is precisely this risk of the erroneous deprivation of a liberty interest that is at stake in application of the 2018 memorandum. This new approach to unlawful presence is devoid of fundamental fairness and is constitutionally suspect.

H. Conclusion

For these reasons, we urge USCIS to abandon this misguided directive and to maintain the unlawful presence guidance that has been in place for decades. It is critical that USCIS ensure that fundamental fairness is a critical component in interpreting and implementing the unlawful presence statute.

Sincerely,

THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION
THE AMERICAN IMMIGRATION COUNCIL

⁴⁸ 424 U.S. 319, 335 (1976).



Penn Global
International Student and Scholar Services

June 11, 2018

To: publicengagementfeedback@uscis.dhs.gov
Re: "Accrual of Unlawful Presence and F, J, and M Nonimmigrants"
PM-602-1060
May 10, 2018

To Whom It May Concern:

The University of Pennsylvania International Students and Scholars Services office appreciates the chance to comment on the policy memo of May 10, 2018, entitled "Accrual of Unlawful Presence and F, J, and M Nonimmigrants".

As a point of departure, we are troubled by the dramatic and abrupt change proposed by this memo. It takes a clear line – that a student begins accruing unlawful presence when a status violation has been formally found by a government official – and replaces it with a scheme that is unnecessarily confusing and all but does away with the longstanding concept of "D/S".

At its heart, our primary concern is our students may face consequences that are quite severe as a result of otherwise minor status violations without having received adequate, or in some cases *any*, notice that such a violation has occurred. The result of these changes will result in an unprecedented number of students who may begin to accrue unlawful status before they even know it. The following examples are just a few of any number of benign scenarios that could result in a student accruing unlawful presence without even knowing that a status violation has occurred:

- A student engages in a volunteer activity that is deemed to have been employment, only years later when applying for an H-1B;
- A student is unknowingly dropped from full-time enrollment because of a financial issue, and then corrects the issue with a later payment and completes the semester;
- A student's timely filed H-1B petition is rejected by USCIS and his or her attorney does not subsequently inform the student in time.

It is unclear from the memo how a student's lapse of status would be affected by a reinstatement request, but such a request comes with the added complication that such a request could easily pend for longer than the 6-month period required to trigger a 3-year bar.

We also feel compelled to point out that many of the situations in which a student might find him or herself fall into gray areas and may be contestable. What becomes, for example, of the student who graduates with a degree in communications and accepts a marketing position that is determined by the DSO to be sufficiently related to that student's degree, but is later determined by USCIS to not be so related? If a student is put on notice by a decision from USCIS, then he or she may leave the US in a timely manner. However, a student who is determined retroactively to have violated status, that student may not have the same opportunity.

Tel [REDACTED] Philadelphia, PA [REDACTED]
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Penn Global
International Student and Scholar Services

Nonimmigrant status is a legal condition, not a physical thing. It is also dynamic, not static. We find the guidance purported by this memo to be misguided, as it confounds the separate concepts of "Unlawful Presence" and "Maintaining Status". Students who come to the US in F, J, or M status are admitted for Duration of Status (D/S) and are not regularly given a date certain admission. That is, the student is admitted for as long as they continue to maintain their status. Whether or not a student has fallen out of status is a question without an obvious answer, and requires a sophisticated individual to make a determination. That determination is a necessary component for the equitable application of Unlawful Presence. The necessary predicate is that one can be in violation of status without being unlawfully present. Currently, even a student who drops out of school completely is not accruing unlawful presence until told so, if that student has clearly otherwise violated his or her status. This memo will remove that notice. As a matter of policy, we suggest that unlawful presence should only occur when one goes beyond a fixed expiration date and not when there is a contestable violation of status.

We note that there are no published regulations that apply specifically to this particular area of immigration law. Given the wide ranging impact and the drastic departure from long-standing practice, we suggest that the subject matter warrants more due process than that provided by a mere memo. We urge USCIS and DHS to engage in an official notice and comment process before enacting relevant regulations. Any implementation should be postponed until such time.

We thank you for your consideration and we appreciate the opportunity to voice our comments.

Sincerely,

A handwritten signature in black ink, appearing to read "Frank Calabrese".

Frank Calabrese, Esq.
Associate Director, ISSS
University of Pennsylvania

██████████ Philadelphia, PA ██████████
Tel ██████████ Fax ██████████ global.upenn.edu/iss

GC CAR000705

June 11, 2018

Mr. L. Francis Cissna
Director
U.S. Citizenship & Immigration Services
Department of Homeland Security
20 Massachusetts Ave, NW
Washington, DC 20529

Submitted via email: publicengagementfeedback@uscis.dhs.gov

Dear Director Cissna:

North Carolina State University (NC State) is a research-extensive land-grant university dedicated to excellent teaching, the creation and application of knowledge, and engagement with public and private partners. By uniting our strength in science and technology with a commitment to excellence in a comprehensive range of disciplines, NC State promotes an integrated approach to problem solving that transforms lives and provides leadership for social, economic, and technological development across North Carolina and around the world. With just over 34,000 students, NC State is the largest university in the state of North Carolina, with students from all 50 states, two U.S. territories, and over 117 foreign countries.

NC State has a vibrant international student community, with 6184 active and initial F-1 records and 573 active and initial J-1 records in the Student and Exchange Visitor Information System. NC State has the largest number of F-1 students of any institution in North Carolina, public or private, as well as a vibrant J-1 scholar program, and for this reason, NC State is well situated to comment on the impact of the U.S. Citizenship and Immigration Services (USCIS) policy memorandum of May 10, 2018 "Accrual of Unlawful Presence and F, J, and M Nonimmigrants."

NC State is concerned about this abrupt departure from policy guidance that has been in place for more than twenty years. Not only is this proposed change operationally complex, which could lead to wrongly identifying a large number of foreign students and exchange visitors as failing to maintain lawful status, it thrusts institutions and F and J program administrators into significant institutional liability and risk. We have broken down our comment into two parts—our legal concerns with this departure in longstanding policy, and the implications of increased institutional liability for our institution and our F and J visa administrators on campus.

Congress established Unlawful Presence as a new ground of exclusion in 1996 as part of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA). Briefly stated, the new memorandum will reverse more than 20 years of USCIS practice regarding the accrual of “unlawful presence,” a legal term defined under section 212(a)(9)(B)(ii) of the Immigration and Nationality Act (INA) by reference to an individual who “is present in the United States after expiration of the period of stay authorized by the Attorney General or is present in the United States without being admitted or paroled.” For nonimmigrant students and exchange visitors in the F, J, and M categories, legacy Immigration and Naturalization Service (INS) and USCIS have interpreted the statutory unlawful presence provisions to require notice to the individual of a status violation prior to the commencement of the unlawful presence clock. Such notice is provided in the context of the adjudication of a request for an immigration benefit by USCIS or a determination of a status violation by an immigration judge. The USCIS guidance articulating this position states, “It must be emphasized that the accrual of unlawful presence neither begins on the date that a status violation occurs, nor on the day on which removal proceedings are initiated.”¹ This longstanding policy provides certainty in determining when unlawful presence begins to accrue, which the new policy does not.

As described in the May 11, 2018 memorandum, USCIS will now deem unlawful presence to have started accruing as of the day after the date that a status violation occurs, thus removing the critical procedural safeguard of providing notice to affected individuals that may find themselves subject to the three- and ten-year bars to admissibility. This raises serious questions regarding fundamental fairness and due process and will have a significant negative impact on the student, vocational, and exchange visitor communities.

In recognition of the fluidity of academic programs, F, M, and J nonimmigrants are not admitted to the U.S. until a date-certain. Instead, they are admitted for the “duration of their status,” or “D/S,” which means the student or exchange visitor can remain in the United States as long as they maintain their nonimmigrant status. This generally means the student must maintain a full course of study or remain in the exchange program, not engage in unauthorized employment or other unauthorized activities, and complete the academic or exchange program in a timely manner or obtain an extension. What the new memorandum fails to recognize is that the question as to whether an individual has violated their nonimmigrant status is complex and nuanced. Students and exchange visitors can accidentally and unknowingly violate their status by dropping slightly below a full course of study, or by engaging in innocent, but unauthorized activity. For example, F-1 students are permitted to engage in work at a “qualifying on-campus job” for up to 20 hours per week while school is in session. Therefore, an F-1 student who inadvertently exceeds the 20-hour limit by just a couple of hours has technically violated his or her student status. In addition, a Designated School Official may make a good faith error in advising a

¹ See USCIS Memorandum, Consolidation of Guidance Concerning Unlawful Presence for Purposes of Sections 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I) of the Act,” (May 6, 2009), *available at* <http://www.aila.org/infonet/uscis-consolidation-guidance-unlawful-presence>.

student by authorizing a reduced course load that should not have been approved, thereby leading the student to unknowingly and unintentionally violate their status. This unfairness is compounded when the status violation also serves as the “trigger” for the accrual of unlawful presence by dependents of students and exchange visitors.

These legal concerns have real impact for University F and J program sponsors, who are charged by SEVP as compliance administrator and adviser to these nonimmigrants. The following substantive institutional potential liability and risk management concerns flow from the legal ramifications of the proposed policy change:

1. Absent an unlawful presence finding by DHS or an Immigration Judge that the F or J individual has violated status, Universities who sponsor F and J nonimmigrants will - *de facto* - become charged with this legal responsibility.

This creates immense risk and liability to institutions of higher education as fact finder and arbitrator of how a potential violation of status may turn duration of status (D/S) into unlawful presence with a bar to re-entry. The University’s Primary Designated Student Official (PDSO) and designated Responsible Officer (RO) and staff are not qualified to make such critical, legal determinations; this has always been the purview of the Department of Homeland Security or Department of Justice. F and J program sponsors have received no guidance or training from DOS or DHS (USCIS, SEVP, etc.) on how to make these complex legal findings. Even with training and guidance, University program sponsors do not, and will not, have access to the F and J nonimmigrant’s complete immigration history, which is essential to a legal determination of unlawful presence. SEVIS access to historical data in F and J status is limited to the sponsoring institution, meaning a school has no access to SEVIS data transferred from another school. The simple fact is that University F and J program sponsors are not the personal immigration attorney of the nonimmigrant; rather their compliance obligation is to SEVP. There is an inherent conflict of interest in placing F and J program sponsors in the position to be collector of facts and arbitrator of a finding of unlawful presence to the F or J beneficiary. This is a complex legal analysis that could bring irreparable harm and long term consequence to the F and J nonimmigrant. Without a clear ruling by DHS officials or an Immigration Judge, F and J nonimmigrants will rely on the University to provide legal analysis on this matter by individuals who are primarily non-attorneys, thereby opening the University to potential legal exposure.

2. Absent a dated notice issued by DHS or an Immigration Judge specifying when the unlawful presence clock is triggered, F and J program sponsors will – *de facto* – become charged with this legal task.

Under the current practice, the nonimmigrant receives a dated notice of the violation of status in writing and the clock is triggered on the day after the date of the notice. The current practice provides certainty and clarity around the important determination of accrued unlawful presence time and whether a 3 or 10 year bar will attach, or because of the retroactive nature of the proposed policy, has already attached. The proposed policy places numerous liabilities on F and J program sponsors in “helping” the nonimmigrant make these determinations in order to take corrective action or otherwise cure the status deficiency. As with #1 above, PSDOs, ROs and their respective DSO and AROs are not qualified to execute this legal function and any errors in judgment, process, or communication will place the University at risk of failure

to properly administer the program, e.g. withdrawal of F-1 program certification or J-1 program designation, as well as potential claims by the nonimmigrant against the University.

3. The retroactive nature of the proposed policy creates institutional liability that can occur at any time and continue without end.

Absent a finding of unlawful presence by DHS or an Immigration Judge legally creating a “date certain” for triggering unlawful presence, any F and J nonimmigrant may enroll at the University in initial status or as a transfer and, wittingly or unwittingly, bring with them possible unlawful presence. Further, any action by the nonimmigrant that may, wittingly or unwittingly, have caused them to temporarily fall out of status during their time at the University will forever bind that institution with the unlawful presence finding, whether at the time known to the University or not. The combination of uncertainty in whether unlawful presence has attached, lack of clarity around when the clock starts, and retroactive nature of this proposed policy will mean that the University will be subject to potential liability and risk. Any attempt to “help” the nonimmigrant identify an unlawful presence event and count accrued time could make the University liable. In the alternative, if the University does not weigh in on these legal matters, it could also be potentially held liable for failure to properly advise the nonimmigrant and adequately comply with SEVP program requirements.

4. The proposed unlawful presence policy will fundamentally change the nature of higher education compliance as SEVP program sponsors and advising to F and J nonimmigrants.

The dedicated (P)DSOs and (A)ROs at NC State take immigration compliance and their related advising duties seriously. Their inherent relationship with SEVP Field Representatives (which at the moment is an open and vacant position for our region) and with F International Students and J Exchange Visitors must operate within an environment of candor and trust. The proposed unlawful presence policy erodes such trust and creates the setting that all F and J nonimmigrants could be potential liabilities to the University if previous status violations, for whatever reason, were not disclosed or even known. Basic advisory functions around maintenance of status, international travel and reinstatement will become mired in institutional risk and liability if 3 and 10 year bars to re-entry under unlawful presence become part of (P)DSOs and (A)ROs advising responsibility. Such complex and dire consequences will likely impact the University’s ability to administer the program within current SEVP regulatory and compliance requirements.

In light of these significant concerns, the University supports the recommendations submitted by NAFSA: Association of International Educators on May 24, 2018. Namely that in lieu of implementing the policy described in the memo, the following happen:

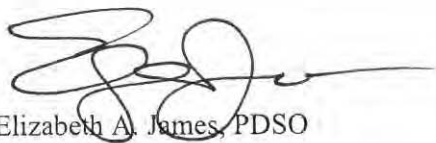
- Leave in place the current policy, which has benefited the United States for over 20 years. Neither DHS nor legacy INS ever published regulations to implement this important area of law. If the agency wishes to implement such drastic changes to longstanding common interpretation of the law, it must be done according to the Administrative Procedures Act (APA) and through notice and comment.

- Implementation of any unlawful presence policy change must be fully coordinated with relevant government stakeholders, such as the Department of State, including the Visa Office and the Bureau of Education and Cultural Affairs' Exchange Visitor Program, and other divisions of DHS, including Immigration and Customs Enforcement (ICE) and the Student and Exchange Visitors Program (SEVP), and Customs and Border Protection (CBP).
- Exclude from unlawful presence count any status violations that occurred under color of law, where the student or exchange visitor reasonably relied on authorizations granted. For example, curricular or optional practical training authorized by SEVIS, or admission by CBP, or any number of agency actions that DHS later determines may have been improperly given should not start the unlawful presence clock until DHS or an Immigration Judge makes a formal status determination.
- Apply the change of status/extension of stay "tolling rule" to reinstatement applications.
- Expand the sections describing where F, J, and M nonimmigrants "do not accrue unlawful presence in certain situations." [draft Adjudicator's Field Manual 40.9.2(b)(1)(E)(iii)].

As you review the comments submitted, I implore you to incorporate stakeholder concerns into consideration to ensure that American universities are not negatively impacted by the proposed draft policy memorandum.

Thank you for your attention and consideration to these issues.

Sincerely,

A handwritten signature in black ink, appearing to read "Elizabeth A. James", with a long horizontal flourish extending to the right.

Elizabeth A. James, PDSO
Director

June 11, 2018

Mr. L. Francis Cissna
Director
U.S Citizenship & Immigration Services
Department of Homeland Security
20 Massachusetts Avenue, NW
Washington, D.C 20529

Dear Director Cissna,

In regards to the May 10 Memorandum "Accrual of Unlawful Presence of F, J and M Nonimmigrants" I believe there are two areas that need to be considered in this policy change.

Terminations at the F, J and M level are largely done by PDSO/DSO and A/RO's –

Interpretations of what constitutes a violation of status that should result in termination are made by PDSO/DSO and A/RO's and they range widely depending on the individual DSO's regulatory interpretation style, institutional policy, etc. This leads to vast inconsistencies in what is considered a "violation" of F, J and M status. An example is cases where CPT authorization is determined differently based on institution or what is considered "full-time" for PhD students, also varies by institutional policy.

These and other interpretations/policies vary so much by institution and individual office/advisor, even though there are INA 214 regulations and SEVP policy guidance, the fact remains that a DSO's decision to terminate status should always remain up to interpretation/final ruling.

DSOs are not trained immigration lawyers or judges. Most of us are student affairs administrators, student advocates and support services primarily, DSOs secondarily. To be blunt, we don't get paid by DHS, we don't really work for DHS. We work for our schools and for our students. This is a very important dynamic and distinction. Changing the significance of the "termination date" as the moment a student begins accruing unlawful presence will shift the dynamic between college personnel and students, a change with the ability to significantly impact the level of trust students' will place in their International advising staff and offices.

This contributes to the second point I wish to make, which is –

USCIS Processing times –

Currently, estimated processing time of a reinstatement of status is listed as 10.5-13.5 months on the USCIS Case Status <https://egov.uscis.gov/processing-times/> This is well beyond the 180 days wherein, if a student is ultimately denied, they are immediately subject to a 3 year or even 10 year bar of admission. This is unacceptable.

Life happens for these students. It occasionally means that a student finds themselves unwittingly out of legal F1 status. There are (presumably) hundreds of reinstatement cases approved each year. So, in essence, USCIS recognizes that there are cases where a student falling out of status was through unforeseen and completely acceptable circumstances, and they are in fact, entitled to be reinstated.

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If this memorandum goes through as is, it will be completely unwise for any student to apply for reinstatement as it will be assuming a very expensive, very big risk. In the past, I have always advised students that there is, of course, inherent risk that they will not be granted reinstatement, but the risk is mitigated by the fact that the reward outweighs the cost of the application, the only major risk under the old policy. Now, since unlawful presence will have already begun to accrue while USCIS takes an enormous amount of time making a decision, that risk is too great.

I fear we will lose hundreds of students who otherwise may have been able to continue their studies without any issue. Now, they will simply choose not to try and instead return home, taking all of their talent and potential with them.

This memorandum reads as a clear goal to simply reduce the number of foreign students and scholars in the U.S. This hurts stakeholders from both the private and public sector, all of whom should have the opportunity to be consulted on such a significant change in policy.

Proposal of changes –

In conclusion, I would like to echo the following recommendations from NAFSA's official comment letter, dated May 24, 2018 –

- Leave in place the current policy, which has served for over 20 years. Neither DHS nor legacy INS ever published regulations to implement this important area of law. If the agency wishes to implement such a drastic change to longstanding common interpretation of law, it must be done through the notice and comment process.
- Exclude from the unlawful presence count any status violations that occurred under color of law, to avoid "gotcha" scenarios, where the student reasonably relied on the authorizations granted. For example, curricular practical training authorized in SEVIS that DHS later determines may have been improperly given, should not start the unlawful presence "clock" until DHS or an immigration judge makes a formal status determination.
- Apply the change of status/extension of stay tolling rules to reinstatement applications.
- Expand the sections describing examples where F, M and J nonimmigrants "do not accrue unlawful presence in certain situations"

Thank you for the opportunity to comment,

Kara Kauffman

June 11, 2018

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of the Director
20 Massachusetts Avenue, NW
Washington, DC 20529-2140

Submitted via email: publicengagementfeedback@uscis.dhs.gov

Re: USCIS Policy Memorandum: Accrual of Unlawful Presence and F, J, and M Nonimmigrants (PM-602-1060)

Dear Sir or Madam:

I am writing in regards to the new policy memorandum, "Accrual of Unlawful Presence and F, J, and M Nonimmigrants (PM-602-1060)," posted by U.S. Citizenship and Immigration Services (USCIS) on May 11, 2018.

Founded in 1898, Northeastern University is a global, experiential research university. Our tradition of partnership and engagement creates a distinctive approach to education and research built on the values of experiential learning, innovation, and entrepreneurship. Northeastern University is the recognized leader in experiential learning, powered by the world's most innovative cooperative-education program. We offer students opportunities for professional work, research, service, and global learning in 131 countries on seven continents. The same spirit of engagement guides a use-inspired research enterprise that is strategically aligned with three global imperatives: health, security, and sustainability. Northeastern University offers a comprehensive range of undergraduate and graduate programs leading to degrees through the doctorate in nine colleges and schools, and select advanced degrees at graduate campuses in Silicon Valley, Charlotte, Seattle and Toronto. The geographically and ethnically diverse student body is made up of more than 37,000 students, with over 18,000 undergraduate students and 14,500 graduate students. In addition, Northeastern University has over 2,800 faculty members and 2,900 staff, which together total over 5,700. Finally, Northeastern University hosts over 13,000 international undergraduate and graduate students and postdoctoral scholars from 147 different nations across the world supported by the university's Office of Global Services. Our staff's commitment ensures that our community maintains compliance through their immigration, academic, and employment experiences.

Following the release of this new policy memorandum, there have been significant discussions amongst Designated School Officials (DSOs) and Alternate Responsible Officers (AROs) both at Northeastern University and at higher education institutions across the U.S. International student and scholar advisors spend a significant amount of time advising and supporting international students and scholars on maintaining their immigration status in the U.S. This is something that the vast majority of international students and scholars deeply and sincerely want to do, and this means they need to remain aware of all immigration regulations while also balancing the

demands all students and scholars experience along with their institution's requirements. It is for this reason that while changes in regulations can be expected, these proposed changes are especially problematic and heavily burdensome to administer by higher education institutions, including Northeastern University.

The new memorandum will reverse more than 20 years of USCIS practice regarding the accrual of "unlawful presence," a legal term defined under section 212(a)(9)(B)(ii) of the Immigration and Nationality Act (INA) by reference to an individual who "is present in the United States after expiration of the period of stay authorized by the Attorney General or is present in the United States without being admitted or paroled." For nonimmigrant students and exchange visitors in the F, J, and M categories, legacy Immigration and Naturalization Service (INS) and USCIS have interpreted the statutory unlawful presence provisions to require notice to the individual of a status violation prior to the commencement of the unlawful presence clock. Such notice is provided in the context of the adjudication of a request for an immigration benefit by USCIS or a determination of a status violation by an immigration judge. The USCIS guidance articulating this position states, "It must be emphasized that the accrual of unlawful presence neither begins on the date that a status violation occurs, nor on the day on which removal proceedings are initiated."¹ This longstanding policy provides certainty in determining when unlawful presence begins to accrue, which the new policy does not. The new policy will cause a great deal of uncertainty for international students and scholars holding F and J immigration status in the U.S.

As described in the May 11, 2018 memorandum, USCIS will now deem unlawful presence to have started accruing as of the day after the date that a status violation occurs, thus removing the critical procedural safeguard of providing notice to affected individuals that may find themselves subject to the three year, ten year or permanent bars to admissibility. This raises serious questions regarding fundamental fairness and due process and will have a significant negative impact on the student and exchange visitor communities.

In recognition of the fluidity of academic programs, F, M, and J nonimmigrants are not admitted to the U.S. for a finite period. Instead, they are admitted for the "duration of their status," or "D/S," which means the student or exchange visitor can remain in the United States as long as they maintain their nonimmigrant status. This generally means the student must maintain a full course of study or remain in the exchange program, not engage in unauthorized employment or other unauthorized activities, and complete the academic or exchange program in a timely manner or obtain an extension. What the new memorandum fails to recognize is that the question as to whether an individual has violated their nonimmigrant status is complex and nuanced. Students and exchange visitors can accidentally and unknowingly violate their status by dropping slightly below a full course of study, or by engaging in innocent, but unauthorized activity. For example, F-1 students are permitted to engage in work at a "qualifying on-campus job" for up to 20 hours per week while school is in session. Therefore, an F-1 student who inadvertently exceeds the 20-hour limit by just a couple of hours has technically violated his or her student status. In addition, a Designated School Official may make a good faith error in advising a student, thereby leading the student to unknowingly and unintentionally violate their

¹ See USCIS Memorandum, Consolidation of Guidance Concerning Unlawful Presence for Purposes of Sections 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I) of the Act," (May 6, 2009), available at <http://www.aila.org/infonet/uscis-consolidation-guidance-unlawful-presence>.

status. This unfairness is compounded when the status violation also serves as the “trigger” for the accrual of unlawful presence by dependents of students and exchange visitors.

USCIS states that the purpose of the new guidance is to “reduce the number of overstays” and “to improve how USCIS implements the unlawful presence ground of inadmissibility.”

Unfortunately, we believe this approach accomplishes neither of these goals and will instead unfairly punish a potentially significant portion of the student and exchange visitor population, potentially lead to decreasing foreign student enrollments at U.S. colleges and universities, and unnecessarily damage the U.S. economy.

Northeastern University respectfully urges USCIS to maintain the current unlawful presence guidance that has been in place for over 20 years and ensures that fundamental fairness is a critical component in interpreting and implementing the unlawful presence statute.

Sincerely,

Timothy E. Leshan
Vice President for Government Relations
Northeastern University




MURTHY LAW FIRM

Immigration matters!®

Owings Mills, MD

June 11, 2018

Mr. L. Francis Cissna, Director
U.S. Citizenship and Immigration Services
Department of Homeland Security
20 Massachusetts Avenue, NW
Washington, DC 20529

Re: Murthy Law Firm Comments on the USCIS Policy Change Regarding
Unlawful Presence for F, J, and M Nonimmigrants

Dear Director Cissna:

The Murthy Law Firm writes in response to the U.S. Citizenship and Immigration Service (USCIS) policy memorandum "Accrual of Unlawful Presence and F, J, and M Nonimmigrants", dated May 10, 2018 ("the Memo"). The Memo is a troublesome, unjust, and impractical shift in policy with unintended consequences that will negatively impact students, their families, the U.S. educational system, and the economy. As such, it will have far-reaching harmful effects on our country.

This Memo appears to be part of a larger shift in the atmosphere of our country. To many Americans, it feels as if our legal and judicial systems are under assault by the current Administration, which has directly resulted in the loss of credibility of our government and institutions. Such a change is harmful for our country in the long term and threatens the democracy of the greatest nation on earth – a nation, it should be noted, which was largely built by immigrants and their descendants.

For the reasons outlined below, the Murthy Law Firm respectfully requests that the USCIS withdraw the Memo:

Overview of the Impact of the Memo

The proposed policy in the Memo upends more than two decades of guidance, which made a clear distinction between the concepts of status and unlawful presence. The current policy provides some semblance of protection to international students by providing clear lines as to when she or he will begin to accrue unlawful presence: either after the date of the expiration of the I-94 or upon an adverse finding by the USCIS or a judge. Under the current policy, international students are provided with clear notice of when they will begin to accrue unlawful presence, allowing them and their families time to comply with the law and depart the United States in a timely manner or to pursue other means of legal recourse. This Memo erases this protection and replaces it with an unclear and confusing standard of determining unlawful presence.

Stated Purpose of the Memo Contradicts its Practical Application

The Memo states one of its purposes is to “improve how USCIS implements the unlawful presence ground of inadmissibility under INA 212(a)(9)(B) and INA 212(a)(9)(C)(i)(I).” It is unclear, however, how altering the current unambiguous policy could aid in the implementation of the bars to admission. Rather, the change in policy proposed in the Memo appears likely to cause great confusion to foreign nationals, Designated School Officials (“DSO”), and U.S. Customs and Border Protection (“CBP”) Inspectors at ports of entry. In fact, pursuant to the Memo, the CBP Inspectors may incorrectly refuse admission for a larger number of international students and exchange visitors and their families. The Memo is written in such a way that it creates the potential for international students to be subject to harsh penalties through simple mistakes that go unnoticed, both by DSOs and the students, and not due to their conscious action. It seeks to blur a once bright line rule and aims to do so for only a targeted class of nonimmigrants, namely international students, who provide billions of dollars in revenue to the U.S. educational system and help our economy with their investment in our fine universities.

Lack of Clarity of Violation of Status

More specifically, this policy would create a separate class of foreign nationals, namely those in F, J, M status and their dependents, who would begin to accrue unlawful presence immediately upon any violation of status, no matter how minor the infraction. Such a departure from previous policy is particularly concerning during such a turbulent time in immigration law, especially for student visa holders who appear to be subject to much of the government’s increased scrutiny. International students are expected to keep up with complicated and nuanced legal concepts, some of which even experienced attorneys struggle to grasp. This is compounded by the fact USCIS has abruptly changed its policy with little to notice, by, for example, making unannounced website updates and enforcing them as law, such as the 2018 change in STEM OPT extensions being retroactively applied against international students working with consulting companies.

Unintentional Oversight Could Result in 3 or 10 Year Bars

It appears USCIS has failed to consider just how this policy will function within the already established law. For example, INA §222(g) automatically voids a nonimmigrant’s visa when he or she “remained in the United States beyond the period of stay authorized by the Attorney General.” F, M, and J nonimmigrants are admitted to the United States for Duration of Status (“D/S”) and therefore do not have an end date on their I-94s. The language of the statute clearly applies in the instance of traditional visa admittance, and can be unambiguously applied under the currently policy. The language of the statute, however, does not account for those admitted for D/S. It is unclear, then, how this provision of the Act will now apply, if at all, to F, M, and J nonimmigrants who begin to accrue unlawful presence. Furthermore, it is unclear whether the U.S. Department of State (“DOS”) and CBP could find that the foreign national violated his or her status during the previous stay and therefore decide to enforce this provision.

Perhaps most troubling, this Memo throws all concept of fairness and equity out the window and fails to consider the harsh impact this policy shift would cause. The Memo gives foreign nationals no notice of their unlawful presence. A student could, for example, violate his or her status and continue to study for months without knowledge of

the misunderstanding or mistake. That mistake may not be discovered until USCIS makes a finding during the adjudication of a separate application or petition, potentially years later. At that time, if the foreign national's status violation was six months prior, she has unknowingly subjected herself to a 3-year or 10-year bar to admission to the United States.

USCIS's Own Adjudication Delays Compound Harmful Consequences

The negative impact on students is further exacerbated by the government's own significant processing times. Students, for example, who apply for reinstatement of their F-1 status, often have to wait in excess of 6 months for a decision. Under the new policy, if the reinstatement is ultimately denied, the student will have accrued unlawful presence for the entirety of the pendency of the application, and will therefore be subject to the 3-year or 10-year bar to admission. Students will be faced with the impossible decision of abandoning their educational aspirations and the loss of tens of thousands of dollars and time already invested in the university or risk subjecting themselves to harsh penalties, should their cases be denied.

Students Rely on DSOs for Proper Advice and Action

The Memo and updated AFM sections do not account for international students' wholehearted reliance on school and government officials. Students often rely heavily on the advice and guidance of DSOs at universities (who are deputed by ICE to understand and advise students). The students understandably believe that the DSO has correctly granted F-1 benefits, such as Curricular Practical Training ("CPT") authorization and Optional Practical Training ("OPT") recommendation. Under the Memo, nonimmigrants who reasonably rely upon the guidance of a DSO who improperly or incorrectly grants any such benefits will immediately, and without notice, be subject to the harsh consequences of unlawful presence, which may not be brought to their attention until months or even years later.

Harsh Impact on Innocent Family Members

The Memo will also lead to harsh effects for dependents in F-2, M-2, and J-2 status. Under the proposed policy, dependents begin to accrue unlawful presence as soon as the principal nonimmigrant violates their status. As a result, dependents would begin to accrue unlawful presence without any notice and through absolutely no action (or inaction) on their part, which violates the principles of fundamental due process provided under the U.S. Constitution and our system of fairness and justice.

Devastating Impact of the Loss of International Students

This Memo is likely to directly lead many potential international students to study in other countries that are more welcoming of their financial investment and talent. These other countries' gain will certainly be the United States' loss. These international students contribute not only economically but also invest their intellectual capital to enrich the country where they have chosen to study. For example, in 2016 "all 6 American winners of the Nobel Prize in economics and scientific fields were immigrants to the United

States.”¹ A study of the number of immigrants awarded the Nobel Prize between 1901 and 2017 found that immigrants had won 33 out of 85 of the Nobel Prizes won by Americans in the Medicine, Physics, and Chemistry.²

Similarly, many international students who study in the United States and return home become leaders in their respective countries. Their appreciation and understanding of the United States’ way of life, culture, and values permeates their institutions. This in turn creates global goodwill, the importance of which cannot be understated. Simply put, we cannot afford to create a demoralizing climate for international students.

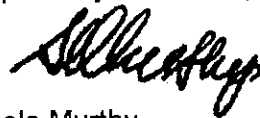
Summary Recommendations Proposed by the Murthy Law Firm

Due to the myriad concerns outlined above, the Murthy Law Firm recommends the following with regards to the proposed Memo:

1. USCIS should withdraw the Memo in its entirety and reassess how it can better accomplish its stated goals of reducing the number of visa overstays and implement the unlawful presence ground of inadmissibility.
2. Alternatively, could consider eliminating D/S for F, J, or M students and replace it with a date certain on their I-94s so as to simplify and track expiration dates.
3. USCIS should implement exceptions to the policy in instances where an international student reasonably relied on the actions and decisions of trusted officials authorized to represent the government and ICE, such as DSOs.
4. USCIS should update the policy to allow for tolling of unlawful presence when an international student has a pending reinstatement, change of status, or other application or petition.

We thank you for the opportunity to provide our input and trust and expect that you will consider the far-reaching impact of the Memo and take the necessary action to mitigate the harsh consequences of such a complete shift in policy.

Respectfully submitted,



Sheela Murthy
President & CEO



Allison A. Terry
Attorney

¹ <https://www.forbes.com/sites/stuartanderson/2017/10/08/immigrants-keep-winning-nobel-prizes/#7e46e7dc117b>.

² National Foundation for American Policy, *Immigrants and Nobel Prizes: 1901- 2017* at 1, available at <http://nfap.com/wp-content/uploads/2017/10/Immigrants-and-Nobel-Prizes-1901-to-2017.NFAP-Policy-Brief.October-20171.pdf>



June 11, 2018

Mr. L. Francis Cissna
Director
U.S. Citizenship & Immigration Services
Department of Homeland Security
20 Massachusetts Avenue, NW
Washington, D.C. 20529

Dear Director Cissna,

FWD.us is writing in response to the May 11th publication by U.S. Citizenship and Immigration Services (USCIS) entitled “Accrual of Unlawful Presence and F, J, and M Nonimmigrants.”

FWD.us is a bipartisan organization started by key leaders in the tech and business community to promote policies to keep the United States competitive in a global economy, starting with commonsense immigration reform and criminal justice reform.

We would like to begin by referencing and expressing our support of the [joint comment filed by a host of higher education associations](#) including the Association of Public and Land-grant Universities, the American Council on Education, and the American Association of Universities. We would also like to acknowledge our support of comments filed by [NAFSA: Association of International Educators](#), and the Presidents’ Alliance on Higher Education and Immigration. FWD.us urges USCIS to seriously consider the concerns of the higher education community before adopting this new policy.

It is critical to note that because USCIS only provided one month for public review and comment of its sudden change of its long standing interpretation of the accrual of unlawful presence for F, J, and M visa holders, our organization has not been able to fully assess its impact. In this comment however, we put forward our strong concerns about the adverse impact this policy will have on employers, negative long-term ramifications to innovation and business in the United States, and about the unlikelihood that this proposed policy would meaningfully increase compliance with immigration law.

By changing the way in which unlawful presence is counted for F, J, and M nonimmigrants, USCIS is running the risk that years after an F, J, or M nonimmigrant student graduates from a U.S. college or university and becomes employed at an American company under a different visa category, they could be cited as having violated their terms of status back when they were a student, leading them to be prosecuted and removed from the country. When this occurs, it is sure to create uncertainty amongst American businesses seeking to hire the most qualified

candidates--who may happen to be international students--and could lead to a rapid decline in the employment of F, J, and M students at American companies, likely also resulting in a reduction of international students attempting to enroll at U.S. colleges and universities. Fewer international students coming through our higher education system would hurt our universities and longer term economic growth. Consequently, in the wake of such a decline in international student post-graduate employment, we would be sending U.S. college and university-educated F, J, and M students back abroad to compete against employers based in the United States. A scenario in which companies in the United States backed away from hiring the best and brightest international students, would quickly reduce one of our most robust talent pipelines and stifle economic growth in our country.

International students currently make up 41 percent of masters and 45 percent of PhDs at U.S. universities, and studies have shown that every foreign-born student who graduates from a U.S. university with an advanced degree and stays to work in STEM creates 2.62 jobs for American workers.

Aside from the fact that this new policy would be administratively challenging to enforce, it would fail to provide necessary notice to F, J, M nonimmigrants and their prospective employers and create unimaginable confusion for all. For decades, USCIS and its predecessor, legacy Immigration and Naturalization Services, have not considered unlawful presence to begin accruing until after notice is provided to an individual in violation of immigration status by way of USCIS adjudicating a filing for an immigration benefit or an immigration judge finding such a violation. F, J, and M nonimmigrants have been given notice that they would be accruing unlawful presence, and thus could be barred from re-entering the U.S. or adjusting their status if they remained in the United States for 180 or more days. If they discovered their violation, they could try to remedy it before it was too late. Under USCIS' proposed new policy outlined in its May 11, 2018 memo however, F, J, and M nonimmigrants would instead begin to accrue unlawful presence the moment their violation occurs, regardless of their knowledge of such violation, thus stripping away certainty in determining when unlawful presence begins to accrue. Similarly, prospective employers seeking to employ F-1 students have less certainty of whether, after paying the required fees to file a petition sponsoring a temporary worker and undergoing the lengthy process, they will ultimately be able to onboard the employee.

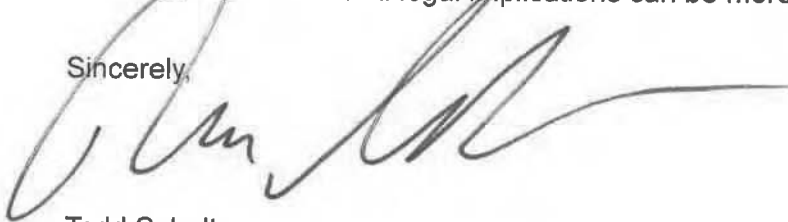
High skilled immigrants, like those who arrive to the United States on F, J, or M visas, grow our economy, create American jobs, and boost wages for native-born workers. In particular, they help to fill a critical skills gap in the current U.S. workforce. The shortage of talented science, technology, engineering and mathematics (STEM) workers presents a serious challenge to companies looking to grow and fill jobs and to continue driving America's global leadership in innovation. International students have filled many of those roles. Without STEM-educated and skilled immigrant workers participating in the United States job market, it's liable to harm our economic growth and reduce our gross domestic product. Rather than making it even more difficult for F, J, and M visa-holding students to comply with an already overwhelmingly byzantine set of immigration laws, we should be reforming the system to make it easier for

students we have invested in through our higher education system to stay here, pay taxes, create jobs, and grow our economy.

In addition to the extreme likelihood that this proposed policy would handicap U.S. innovation, it is also dubious that it would do much to actually increase compliance with immigration laws. At best, this policy would be duplicative of penalties already codified into law through the Immigration and Nationality Act and the Illegal Immigration Reform and Immigrant Responsibility Act to hold individuals accountable who are in the country unlawfully or fail to maintain their status. These violations already can result in three and ten year bars for admission to the United States or loss of eligibility for lawful permanent resident status. At worst, this policy would result in punishing F, J, and M visa holders who unwittingly violated their status because of poor counseling by their institutions or through attempting to navigate our overly complicated immigration system. By excessively limiting the opportunities for nonimmigrant students to comply with the spirit of the law and remain lawfully in status, the United States will eliminate the ability of qualified individuals to contribute to our country and grow our economy.

FWD.us remains concerned about the implementation of this policy that would change the way unlawful presence is counted for F, J, and M nonimmigrants. It is evident that this policy would adversely impact our tech and business sectors and stymie economic growth. In addition, there is little evidence that it would improve compliance with our immigration laws. USCIS' proposed policy change reflects a growing attack on legal immigration that undermines the U.S.' global standing, threatens our economic leadership, and fundamentally contradicts our nation's heritage as a country that welcomes immigrants from every corner of the globe. We join our colleagues in asking that USCIS refrain from implementing this proposed policy on August 9 before the economic and legal implications can be more carefully considered.

Sincerely,

A handwritten signature in dark ink, appearing to read 'Todd Schulte', with a long horizontal flourish extending to the right.

Todd Schulte
President, FWD.us

USCIS UN A FU PR S NC M M

6/12/2018

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of the Director
20 Massachusetts Avenue, NW
Washington, DC 20529-2140

Submitted via email: publicengagementfeedback@uscis.dhs.gov

Re: USCIS Policy Memorandum: Accrual of Unlawful Presence and F, J, and M Nonimmigrants

Dear Madam or Sir:

I am writing to express my opposition and concerns regarding the new policy memorandum, “Accrual of Unlawful Presence and F, J, and M Nonimmigrants,” posted by U.S. Citizenship and Immigration Services (USCIS) on May 11, 2018.

Briefly stated, the new memorandum will reverse more than 20 years of USCIS practice regarding the accrual of “unlawful presence,” a legal term defined under section 212(a)(9)(B)(ii) of the Immigration and Nationality Act (INA) by reference to an individual who “is present in the United States after expiration of the period of stay authorized by the Attorney General or is present in the United States without being admitted or paroled.” For nonimmigrant students and exchange visitors in the F, J, and M categories, legacy Immigration and Naturalization Service (INS) and USCIS have interpreted the statutory unlawful presence provisions to require notice to the individual of a status violation prior to the commencement of the unlawful presence clock. Such notice is provided in the context of the adjudication of a request for an immigration benefit by USCIS or a determination of a status violation by an immigration judge. The USCIS guidance articulating this position states, “It must be emphasized that the accrual of unlawful presence neither begins on the date that a status violation occurs, nor on the day on which removal proceedings are initiated.”¹ This longstanding policy provides certainty in determining when unlawful presence begins to accrue, which the new policy does not.

As described in the May 11, 2018 memorandum, USCIS will now deem unlawful presence to have started accruing as of the day after the date that a status violation occurs, thus removing the critical procedural safeguard of providing notice to affected individuals that may find themselves subject to the three- and ten-year bars to admissibility. This raises serious questions regarding fundamental fairness and due process and will have a significant negative impact on the student, vocational, and exchange visitor communities.

¹ See USCIS Memorandum, Consolidation of Guidance Concerning Unlawful Presence for Purposes of Sections 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I) of the Act,” (May 6, 2009), available at <http://www.aila.org/infonet/uscis-consolidation-guidance-unlawful-presence>.

In recognition of the fluidity of academic programs, F, M, and J nonimmigrants are not admitted to the U.S. until a date-certain. Instead, they are admitted for the “duration of their status,” or “D/S,” which means the student or exchange visitor can remain in the United States as long as they maintain their nonimmigrant status. This generally means the student must maintain a full course of study or remain in the exchange program, not engage in unauthorized employment or other unauthorized activities, and complete the academic or exchange program in a timely manner or obtain an extension. What the new memorandum fails to recognize is that the question as to whether an individual has violated their nonimmigrant status is complex and nuanced. Students and exchange visitors can accidentally and unknowingly violate their status by dropping slightly below a full course of study, or by engaging in innocent, but unauthorized activity. For example, F-1 students are permitted to engage in work at a “qualifying on-campus job” for up to 20 hours per week while school is in session. Therefore, an F-1 student who inadvertently exceeds the 20-hour limit by just a couple of hours has technically violated his or her student status. In addition, a Designated School Official may make a good faith error in advising a student by authorizing a reduced course load that should not have been approved, thereby leading the student to unknowingly and unintentionally violate their status. This unfairness is compounded when the status violation also serves as the “trigger” for the accrual of unlawful presence by dependents of students and exchange visitors.

USCIS states that the purpose of the new guidance is to “reduce the number of overstays” and “to improve how USCIS implements the unlawful presence ground of inadmissibility.” Unfortunately, this approach accomplishes neither of these goals and will instead unfairly punish a potentially significant portion of the student and exchange visitor population, further erode foreign student enrollments at U.S. colleges and universities, and unnecessarily damage the U.S. economy. I urge USCIS to abandon this misguided directive and to maintain the unlawful presence guidance that has been in place for decades and ensures that fundamental fairness is a critical component in interpreting and implementing the unlawful presence statute.

My biggest concern is the retrospective effect of this new interpretation. Based upon the historic interpretation, many aliens have been planning immigration strategies for years at considerable expense to legitimize their unlawful status in reliance on the historic interpretation. If this interpretation is to be implemented, it should only apply to F-1 students and other D/S people who are in breach of their status after this policy change. It should not apply to people who have placed reliance on the long-standing interpretation, and to rely on the old interpretation to consular process and avoid incurring the three and ten-year bars. In other words, there should be no retrospective enforcement of this new interpretation.

Sincerely,

PAUL SHANE


NEWTON MA 



STAND/FOR THE VULNERABLE™
Baltimore Immigration Legal Clinic

T [REDACTED] | F [REDACTED]
worldrelief.net/BaltimoreClinic

June 10, 2018

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of the Director
20 Massachusetts Avenue, NW
Washington, DC 20529-2140

Submitted via email: publicengagementfeedback@uscis.dhs.gov

Dear Director Cissna:

World Relief Immigration Programs would like to comment on the U.S. Citizenship and Immigration Services (USCIS) policy memorandum posted on May 11, 2018, entitled "Accrual of Unlawful Presence and F, J, and M Nonimmigrants."

Our objection to this memorandum is two-fold: first, the new policy is fundamentally unfair to international students and exchange visitors already in the United States and second, it would **not** "reduce the number of overstays" or "improve the implementation of the 'unlawful presence' grounds" as it purports to do. Thus, our organization requests either that the memo be withdrawn or its implementation be delayed for twelve months, such that: (i) the implementation of the new policy may be coordinated with the Department of State and other DHS sub-units such as CBP and SEVP and (ii) those members of the international student education field and the visa holders themselves may have sufficient time to inform themselves about this complicated area of immigration law.

The new memorandum is a sudden change to the immigration policy establishing that F, J and M status holders admitted for duration of status begin accruing 'unlawful presence'¹ only if a formal finding is made that they have violated their immigration status. This long held interpretation ensured that visa holders were aware that they were accruing unlawful presence and could take action to prevent the devastating consequences for departure after unlawful presence². The proposed policy states that 'unlawful presence' begins to accrue on the date a visa violation occurs, thereby eliminating an important procedural protection which provides notice to the visa holder that he or she may suffer INA 212(a)(9)(B) penalties after departing the country.

Implementation of this memo will levy disproportionate punishment against the F, J and M visa holders and their dependents already in the country who have relied on the current 'unlawful presence' policy. It

¹ INA § 212(a)(9)(B)(ii) defines 'unlawful presence' as those individuals "present in the United States after the expiration of the period of stay authorized by the Attorney General or is present in the United States without being admitted or paroled."

² INA § 212(a)(9)(B)(i) establishes a three and ten year bar to reentry for a departure from the United States after more than 180 and 365 days of unlawful presence, respectively

will lead to unjust outcomes immediately and in the future. After August 9, 2018, innocent mistakes that have already been made by such visa holders or administrative errors committed by University personnel could trigger accrual of unlawful presence and thus result in disastrous consequences for the visa holder and their families. Below are several examples of unreasonable consequences of this potential policy:

- An F-1 student who was involved in creating a dorm room business startup with her roommates, without authorization from her Designated School Official (DSO), could be considered as having violated her status. Under the new policy, that innovative student may have unwittingly foreclosed the opportunity of returning to the U.S. by obtaining an H-1B visa abroad after graduating.
- An academic exchange visitor who registered for less than the 12 required credits, due to a serious illness or an accident, would have a status violation because of circumstances outside of his control, through no fault of the visa holder.
- Also, a J-1 student who was erroneously advised by the DSO that she could take an additional course outside of the curriculum of her approved exchange program would have a visa violation because of the mistake of the DSO, not the visa holder.
- Additionally, the student who submits a reinstatement application, to cure a violation of status due to enrollment in insufficient credits in the prior semester, will not have a decision on the reinstatement application for at least six months, and if denied, will already be subject to the unlawful presence bars after any subsequent departure.

These situations of unintentional violation of status could have disastrous consequences without having provided adequate notice in advance about the proposed change in policy and its resulting consequences.

Furthermore, the proposed policy changes are not rationally related to the objectives laid out in the memorandum. First, the changes will not reduce the number of visa overstays. This was one of the motivations behind the passage of IIRIRA in 1996, wherein the unlawful presence bars became effective on April 1, 1997. However, the creation of these bars had the opposite effect, in that it encouraged those without valid status to stay in the U.S. rather than returning to their home countries in order to avoid triggering the unlawful presence bars. Similarly, the visa holders and their families who have been in the U.S. lawfully for years, but who inadvertently violate their status after the August 9 effective date, will most likely choose to stay in the U.S. rather than trigger the unlawful presence bars by a departure, unless they qualify for an inadmissibility waiver. Lastly, the memo specifically subjects F, J and M visa holders to the unlawful presence grounds, but other visa classes that are also admitted for duration of status such as Investor (I) and Diplomatic (A1-2 or G1-4) visas are unaffected by the policy change. There is no discernible explanation in the memorandum as to why investors and diplomatic visitors will not also be subject to the unlawful presence grounds of inadmissibility upon violation of their status.

The policy change will not “improve the implementation of the unlawful presence grounds of INA 212(a)(9)(B) & (C),” and indeed, that does not appear to be the intent of the policy drafters. The memorandum’s reference to President Trump’s Executive Order 13768 solidifies the notion that the intent of this policy is to simply increase the inadmissibility grounds to which F, J and M status holders are subject and thus punitively prevent more of them from being able to obtain status in the future. They are simply changing established policies in order to facilitate the removal of more F, J and M visa holders and discourage potential international students, scholars and researchers from applying for these kinds of visas.

The unlawful presence bars are some of the most draconian provisions of the U.S. immigration system and it is clear in the statutory language that the authors of those provisions intended for the bars to apply to only those individuals who have **notice** that they are in the United States in violation of the law, i.e. those who enter the country illegally, those whose I-94s have expired or those who've been officially notified of a violation by USCIS or an Immigration Judge.

Therefore, this policy change should either be withdrawn from consideration or the implementation should be delayed for one year. This should be the case because it will take at least that amount of time for the international student community, and the institutional personnel who advise them, to fully digest and understand the convoluted and nuanced subject of unlawful presence. This academic community must know the subject thoroughly, not only to prevent the nightmare scenario in which incorrect advice leads to an unintentional status violation, but also to inform potential F, J and M students wanting to study here in the future. Knowledge of this subject must be deep and widespread in order for the policy change to actually deter visa overstays as the policy drafters intended. In addition, this delay would allow the aforementioned State Department and DHS sub-agencies to formulate their own implementation policies and/or make improvements to their information systems that align with the present memorandum. Allowing these other agencies to coordinate with USCIS in implementing the memo, as well as fix errors in their information systems would prevent some of the most glaring mistakes where the unlawful presence bars are unfairly applied to innocent visa holders whose present (and future) status is jeopardized solely due to irregularities in their student records, or other administrative mistakes outside of their control.

Thank you for the opportunity to comment.

Sincerely,

A handwritten signature in black ink, appearing to read 'Courtney Tudi', with a stylized flourish at the end.

Courtney Tudi, Esq.
Director of National Immigration Programs
720-549-4844

■■■■@■■■■



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June 11, 2018

Mr. L. Francis Cissna
Director
U. S. Citizenship & Immigration Services
Department of Homeland Security
20 Massachusetts Avenue, NW
Washington, DC 20529

RE: U.S. Citizenship and Immigration Services policy memorandum of May 10, 2018, "Accrual of Unlawful Presence and F, J, and M Nonimmigrants."

Dear Director Cissna:

As unions, workers' organizations and advocates representing millions of working men and women of all immigration status – including many who work in this country on J, F and other nonimmigrant visas – the AFL-CIO and the undersigned strive to ensure that all who labor in this country receive decent pay, good benefits, safe working conditions, and fair treatment.

We write to convey serious concerns about the proposed changes to the unlawful presence determination process. Although we recognize that nonimmigrants must be in compliance with the law and that visa overstays are a concern, we do not believe that the measures proposed in this memo will be a fair or effective means to address the problem.

The memo creates a subjective and retroactive process with dire potential consequences for international students, researchers, and working men and women in a wide range of industries. The proposed change is likely to lead to wrongful determinations that unfairly trigger bars to re-entry to the United States. The fear of being denied entry, losing eligibility for a visa and other benefits as a result of an unappealable status determination will also have a chilling effect on the ability of these individuals to exercise their civil and workplace rights. This in turn also affects the ability of U.S. citizen co-workers to exercise their own civil and workplace rights, making our workplaces less safe and our country a less desirable place to study and work.

We urge you not to implement this memo and instead to ensure that nonimmigrant students, exchange visitors and workers receive clear notice and full due process before any accrual of unlawful presence.

The proposed revision erodes due process and places an undue burden on visa holders.

To reduce the number of nonimmigrants who violate immigration status or stay beyond the legally allowable period, USCIS must articulate the appropriate role of the sub-agencies of the Department of Homeland Security (DHS) and other federal agencies in ensuring that visa holders have adequate information and notice. There is no indication that USCIS has coordinated implementation of this extreme policy shift with other government stakeholders, including the Department of State (including the Visa Office and the Bureau of Education and Cultural Affairs' Exchange Visitor Program), and other divisions of DHS, such as Immigration and Customs Enforcement (ICE), the Student and Exchange Visitor Program (SEVP), and Customs and Border Protection.

Visa holders who may not be aware of a violation of status will now be considered guilty not only of the original infraction, but also of overstaying their visa in the period since that infraction. While it is clearly the responsibility of nonimmigrant visa holders to remain in compliance with the law, it is crucial that they receive complete and detailed information concerning the rules that govern their stay in the United States and have the right to fair notice, a hearing and the right to appeal.

In the proposed policy, however, due process will be extremely limited. For example, virtually all students whose Student and Exchange Visitor Information System (SEVIS) reinstatement applications are denied would find themselves subject to at least the 3-year bar, merely because USCIS takes so long to adjudicate applications for reinstatement. In addition, a student or exchange visitor might not even know that he or she was in violation of status until DHS issues a formal determination. If the unlawful presence "clock" is seen to start at some distant time in the past in such cases, any window for departing the country will have passed.

The proposed change threatens to chill the exercise of civil and workplace rights.

It is well-documented that workers who are in the United States working pursuant to nonimmigrant work visas, including J-1 visa holders, are frequently exploited during the recruitment process and in their U.S. jobs. These abuses abound in part because the very structure of the program places workers at the mercy of a single employer for both their job and continued presence in the U.S. When a job is abusive, guest workers often cannot leave without facing severe immigration consequences, including loss of status and deportation. As a result, many visa holders choose to endure the abuse, creating a dynamic that lowers standards and working conditions for all workers. The proposed guidance significantly increases the severity of the immigration consequences that workers looking to escape an abusive employer will face. As a result, workers will be even less likely to escape abusive employers and those employers will be able to break the law with impunity.

A number of prominent recent cases from around the country make clear that universities, like other employers, often threaten immigration enforcement consequences when workers engage in concerted activity protected under federal labor law. For example, at Washington University in St. Louis, the employer told graduate students attempting to exercise their federal labor rights that F-1 visa students would immediately lose their status in case of a lawful strike. *See The Washington University in St. Louis*, Case 14-CA-202172, National Labor Relations Board Office of the General Counsel Advice Memorandum, dated Oct. 31, 2017, available at <https://apps.nlr.gov/link/document.aspx/09031d45826e5ffd>. Likewise, at Pennsylvania State University, graduate students alleged that the university had threatened that students on international visas could be affected in case of a strike. Juliana Feliciano Reyes, “Union organizers say Penn State is trying to scare foreign grad students with ICE - and it's working,” *Philadelphia Inquirer*, April 13, 2018, available at <http://www.philly.com/philly/education/penn-state-graduate-union-international-student-visa-ice-20180413.html?mobi=true>.

Such threats by employers of nonimmigrant visa holders will be significantly more forceful should this memorandum be implemented because employers will be incentivized to hold out the possibility that employees who participate in strikes or other protected collective activity will risk not only a loss of status but also the accrual of unlawful presence and its attendant consequences. It will be very difficult for nonimmigrant visa holders to evaluate the accuracy of such threats.

If nonimmigrant visa holders have reasonable basis to fear that their status and ability to remain in and return to the country may be retroactively denied, this will cause a chilling effect on collective activity that undermines the rights of nonimmigrant visa holders and all workers, regardless of their immigration status. *See, e.g., Labriola Baking Co.*, 361 NLRB No. 41, at *2 (Sept. 8, 2014) (noting that “threats touching on employees’ immigration status warrant careful scrutiny” because “they are among the most likely to instill fear among employees.”).

As such, this proposal will allow employers to drive down standards and encourage retaliation against people who blow the whistle on workplace crimes, making our workplaces less safe and our country a less desirable place to study and work. It is yet another policy that will encourage international students, scholars, and workers to take their talents elsewhere.

The proposed change will put well-intentioned students and workers at a risk of severe penalties for accidental or unwitting violations of status.

The memo is an abrupt departure from more than 20 years of policy guidance. The current policy has held up for decades because it provides bright-line dates established in government systems, which give adequate notice to nonimmigrant students, exchange visitors and workers, as well as their schools and exchange programs.

June 11, 2018

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For example, if an individual stays beyond the expiration date on a Form I-94, he or she begins to accumulate days of unlawful presence. However, many status violations, such as those related to SEVIS and nonimmigrant visa renewals, do not present such a bright line, which is why a clear government determination is needed. A formal finding of a status violation made in the course of a DHS benefits determination or by an immigration judge serves as a fair and clear warning to an individual that the clock is ticking, and he or she must take action to leave the United States or otherwise cure the status deficiency. Without definitive notice, the complexity of our system makes unwitting violations likely.

Various documents and the data contained in databases serve as indicators of nonimmigrant status. If all documents and electronic records are consistent, their reliability as indicators is high. However, these documents and records reflect only a snapshot in time and are subject to both machine and human error.

A failure to account for inconsistency among immigration documents, electronic records, and real world developments could easily lead to an adverse determination on status or benefit eligibility. Whether the data in documents and electronic records is being interpreted correctly, taking into account all applicable law and policy, is also a primary concern.

Immigration law is complicated, and both compliance and enforcement are technical matters that require training and expertise. Because of this complexity, an individual on an F, J, or M visa often does not even know he or she is “out of status” until informed by the government.

We oppose the changes proposed in this guidance, and urge USCIS to maintain a fair process of notification and review before unlawful status can begin to accrue.

Thank you for the opportunity to comment.

Sincerely,

AFL-CIO

American Association of University Professors

American Federation of Teachers

Centro de los derechos del Migrante, Inc.

Communication Workers of America

Freedom Network USA

National Education Association

Service Employees International

Southern Poverty Law Center

United Automobile, Aerospace and Agricultural Implement Workers

United Food and Commercial Workers

United Steelworkers



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June 11, 2018

Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of the Director
20 Massachusetts Avenue, NW
Washington, DC 20529-2140

Submitted via email: publicengagementfeedback@uscis.dhs.gov

Re: USCIS Policy Memorandum: Accrual of Unlawful Presence and F, J, and M Nonimmigrants

Dear Madam or Sir:

The American Immigration Lawyers Association (AILA) and the American Immigration Council (Immigration Council) respectfully submit the following comments in response to the USCIS Memorandum, “Accrual of Unlawful Presence and F, J, and M Nonimmigrants,” posted on the USCIS website on May 11, 2017.¹

Established in 1946, AILA is a voluntary bar association of more than 15,000 attorneys and law professors practicing, researching and teaching in the field of immigration and nationality law. Our mission includes the advancement of the law pertaining to immigration and nationality and the facilitation of justice in the field. AILA members regularly advise and represent businesses, U.S. citizens, U.S. lawful permanent residents, and foreign nationals regarding the application and interpretation of U.S. immigration laws.

The American Immigration Council is a non-profit organization established to increase public understanding of immigration law and policy, advocate for the fair and just administration of our immigration laws, protect the legal rights of noncitizens, and educate the public about the enduring contributions of America’s immigrants. In addition, through its work on the economic benefits of immigration reform, the Immigration Council has helped to establish baseline standards for understanding the important role immigration plays in shaping and driving a twenty-first century American economy.

A. Background and Overview of Historical Interpretation of Unlawful Presence

“Unlawful presence” is a legal term defined under section 212(a)(9)(B)(ii) of the Immigration and Nationality Act (INA). The term refers to an individual who “is present in the United States after expiration of the period of stay authorized by the Attorney General or is present in the United States without being admitted or paroled.” Under INA §212(a)(9)(B), a person who has been unlawfully

¹ PM 602-1060, “Accrual of Unlawful Presence and F, J, and M Nonimmigrants,” (May 10, 2018) *available at* https://www.uscis.gov/sites/default/files/USCIS/Outreach/Draft%20Memorandum%20for%20Comment/AccrualofUnlawfulPresenceFJMNonimmigrantsMEMO_v2.pdf

present for more than 180 days but less than one year and who departs the United States is barred from returning for three years. A person who departs after having been unlawfully present for more than one year is barred for ten years. Created by Congress with the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), the unlawful presence provisions took effect on April 1, 1997.²

In recognition of the fluidity of academic programs, F, M, and J nonimmigrants are not admitted to the U.S. until a date-certain. Instead, they are admitted for “duration of status,” or “D/S,” which means the student or exchange visitor can remain in the United States as long as he or she maintains nonimmigrant status. This generally means the individual must maintain a full course of study or remain in the exchange program, not engage in unauthorized employment or other unauthorized activities, and complete the academic or exchange program in a timely manner or obtain an extension.

Because international students are not admitted until a date-certain, legacy Immigration and Naturalization Service (INS) and USCIS have interpreted the statutory unlawful presence provisions to require notice of a status violation to individuals admitted for “D/S” before the unlawful presence clock will start. Such notice is provided in the context of the adjudication of a request for an immigration benefit by USCIS or a determination of a status violation by an immigration judge. Beginning in 1997, this interpretation was commemorated in a series of USCIS guidance documents and was most recently reiterated in the May 6, 2009 “Consolidation of Guidance Concerning Unlawful Presence for Purposes of Sections 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I) of the Act.”³ The 2009 guidance emphasizes that “the accrual of unlawful presence neither begins on the date that a status violation occurs, nor on the day on which removal proceedings are initiated.”⁴ Further, Chapter 40.9.2(a)(2) of the Adjudicator’s Field Manual (AFM) makes it clear that “to understand the operation of sections 212(a)(9)(B) and 212(a)(9)(C)(i)(I) of the Act, it is important to comprehend the difference between being in an unlawful immigration status and the accrual of unlawful presence.... Although these concepts are related ... they are not the same.”

B. Summary of USCIS’s New Interpretation of Unlawful Presence

As described in the May 11, 2018 memorandum (hereinafter “2018 memorandum” or “memo”), USCIS will now deem unlawful presence to have started accruing for F, M, and J nonimmigrants as of the day after the date that a status violation occurs, thus removing the critical procedural safeguard of providing notice to affected individuals that may find themselves subject to the three- and ten-year bars to admissibility. For status violations found to have occurred on or before August 9, 2018, the effective date of the memo, unlawful presence will be calculated beginning August 10, 2018, if not accrued earlier.

When assessing whether a status violation has occurred, the memo states that adjudicators are to consider: (1) information contained in systems available to USCIS; (2) information contained in the individual’s “A file;” and (3) information obtained through a Request for Evidence (RFE) or Notice of Intent to Deny (NOID). Moreover, the memo states that while the status of the spouse and children of an F, J, or M nonimmigrant is contingent on the status of the principal nonimmigrant, the period of stay authorized for a dependent spouse or child may also end due to their own conduct or circumstances.

² Div. C of Pub. Law No. 104-208 (Sept. 30, 1996).

³ See <http://www.aila.org/infonet/uscis-consolidation-guidance-unlawful-presence>.

⁴ *Id.* at 25.

After more than 20 years of consistent interpretation that recognizes the principle of fundamental fairness and provides certainty in determining when unlawful presence begins to accrue, USCIS is abruptly changing course and conflating the two distinct legal concepts of “status violation” and “unlawful presence.” There is no doubt that this new approach to interpreting unlawful presence will have a significant negative impact on the student, vocational, and exchange visitor communities, and will further erode foreign student enrollments in U.S. colleges and universities. Moreover, for the reasons described below, we submit that the 2018 memorandum is an unlawful interpretation of the statutory unlawful presence provisions and cannot stand.

C. The 2018 Memorandum Conflicts with the Unlawful Presence Statute, which is Clear on its Face

The 2018 memorandum conflicts with the unambiguous language of the INA. In 1996, Congress created the new concept of unlawful presence, clearly stating that a person is “unlawfully present” if he or she “is present in the United States after the expiration of the period of stay authorized by the Attorney General or is present in the United States without being admitted or paroled.”⁵ Thus, equating unlawful presence with a status violation is contrary to Congress’ clearly expressed intent. Moreover, principles of statutory construction confirm that Congress never intended such an interpretation, as the new unlawful presence provisions were incorporated into the INA without any modification to the numerous provisions that penalize a person for a “status violation” or “failure to maintain status.” For example:

- **INA §212(a)(6)(G):** Renders a noncitizen who “violates a term or condition” of an F-1 student visa inadmissible until the noncitizen has been outside of the United States for a continuous period of five years after the violation.
- **INA §237(a)(1)(C)(i):** Renders a noncitizen deportable if he or she has “failed to maintain the nonimmigrant status in which [he or she] was admitted ... or to comply with the conditions of any such status.”
- **INA §245(c)(2):** Renders a noncitizen ineligible for §245 adjustment of status if the noncitizen engages in unauthorized employment, “is in unlawful immigration status,” or “has failed ... to maintain continuously a lawful status since entry into the United States.”
- **INA §245(c)(7):** Renders a noncitizen ineligible for §203(b) adjustment of status who is “not in a lawful nonimmigrant status.”
- **INA §245(c)(8):** Renders a noncitizen ineligible for §245 adjustment of status who “has otherwise violated the terms of a nonimmigrant visa.”
- **INA §245(k):** Includes, as part of its eligibility requirements, that an individual not “fail[] to maintain, continuously, a lawful status.”

Other statutory provisions confirm that Congress intended the two concepts to remain distinct. For example, adjustment of status under INA §245A(a)(2) requires: (1) entry before January 1, 1982; (2) continuous residence in unlawful status since such date; and (3) that the period of authorized stay expired before January 1, 1982, or that the government knew of the unlawful status. The third prong makes it clear that expiration of a period of authorized stay and “unlawful status” of which the

⁵ INA §212(a)(9)(B)(ii).

government is aware are different concepts. Otherwise, adopting an interpretation in line with the 2018 memorandum, individuals who violated the terms of their status would automatically be deemed outside the “period of authorized stay” and the purposeful distinction noted in prong (3) would be irrelevant.⁶

In addition, the unlawful presence statute itself distinguishes between “unlawful presence” and “status” in INA §212(a)(9)(B)(iv)(II). That section states that the accrual of unlawful presence is tolled for an individual who “has filed a nonfrivolous application for a change or extension of *status* before the date of expiration of the period of stay authorized by the Attorney General” (Emphasis added). By using the terms “status” and “unlawful presence” in this way, Congress evinced that these are separate legal concepts with distinct legal consequences.

As explained by the Supreme Court, “it is a normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning.”⁷ “A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant.”⁸ Any interpretation of “unlawful presence” or “expiration of the period of authorized stay” that is conflated with a “status violation” or “failure to maintain status” would render sections of the INA superfluous.

When it intends to penalize a failure to maintain status or status violation, Congress has made that intention clear by the plain language of the statute. Section 212(a)(9)(B) of the INA makes no reference to these terms or concepts. Where “one interpretation of a statute or regulation obviously could have been conveyed more clearly with different phrasing, the fact that the authors eschewed that phrasing suggests ... that they in fact intended a different interpretation.”⁹ Therefore, the 2018 memorandum, which folds the concept of a status violation into the definition of unlawful presence, is contrary to the plain language of the statute and the unambiguous intention of Congress in its adoption of INA §212(a)(9)(B).

D. Assuming without Conceding that the Statute is Ambiguous, the Memorandum Is Not Entitled to Deference

Because there is no ambiguity in the statute, the law is applied as written and the 2018 memorandum receives no deference under *Chevron, U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*¹⁰ Assuming only for argument’s sake that an ambiguity exists, the guidance – which was not issued through the formal rulemaking process – would at most be afforded deference under *Skidmore v. Swift & Co.* but here too, that fails.¹¹ Deference under *Skidmore* depends on “the thoroughness evident in [the agency’s] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.”¹² Based on flawed and inconsistent reasoning, the 2018 memorandum reverses the agency’s long-standing interpretation of unlawful presence without adequate justification, is not designed to achieve its stated goals, and cannot stand.

⁶ See also 8 USC §1365(b)(2), which similarly distinguishes between the expiration of a period of authorized stay and unlawful status known to the government.

⁷ *Taniguchi v. Kan Pacific Saipan, Ltd.*, 566 U.S. 560, 571 (2012) (internal citations omitted).

⁸ *Corley v. United States*, 556 U.S. 303, 314 (2009) (internal citations omitted).

⁹ *Gerbier v. Holmes*, 280 F.3d 297, 309 (3d Cir. 2002) (quoting *United States v. Ibarra-Galindo*, 206 F.3d 1337, 1339 (9th Cir. 2000) (overruled on other grounds)).

¹⁰ 467 U.S. 837, 842-43 (1984).

¹¹ 323 U.S. 134, 140 (1944).

¹² *Id.* at 140.

Skidmore instructs us to consider the agency’s “consistency with earlier and later pronouncements.” As noted above, the 2018 memorandum represents a significant departure from more than 20 years of a single, unified approach to unlawful presence for F, J, and M nonimmigrants. In evaluating “the thoroughness evident in [the agency’s] consideration [and] the validity of its reasoning,” we address each of the points USCIS makes to justify the change in unlawful presence interpretation.

First, USCIS states that “the former INS policy, as consolidated in the AFM, went into effect in 1997, prior to the creation of some of the technologies and systems currently used by DHS to monitor nonimmigrants ... in F, J, or M status.”¹³ More specifically, it notes that “since the creation of the policy, the Student and Exchange Visitor Information System (SEVIS) ... has provided USCIS officers additional information on an alien’s immigration history.”¹⁴ However, SEVIS went into effect in 2003. Although this was six years after INA §212(a)(9)(B) took effect in 1997, it was also six years *before* the 2009 consolidated guidance reaffirmed USCIS’s long-standing interpretation of unlawful presence. Moreover, as acknowledged by SEVIS itself, the accuracy and integrity of SEVIS data is flawed,¹⁵ and “[i]naccurate data can affect the status of the student’s SEVIS record and put the student’s eligibility for benefits at risk.”¹⁶

Second, USCIS claims that the purpose of the new policy is to “reduce the number of overstays.”¹⁷ However, this is not borne out by the policy itself, which provides no instructions or guidance on preventing overstays, such as notifying students and exchange visitors in advance of the end of their program. Instead, the memorandum introduces a “gotcha” approach, instructing adjudicators to search records for perceived status violations and retroactively calculate periods of unlawful presence without notice. Far from reducing the number of overstays, the memorandum expands the very definition of what constitutes an overstay – something the agency has no legal authority to do. The approach to unlawful presence described in the memo does nothing to advance this stated purpose.

In support of this stated goal, USCIS cites the DHS Fiscal Year 2016 Entry/Exit Overstay Report,¹⁸ which notes that for FY 2016, “the estimated overstay rate was 6.19 percent for F nonimmigrants, 3.80 percent for J nonimmigrants, and 11.60 percent for M nonimmigrants.”¹⁹ However, the figures cited by USCIS include “out-of-country” overstays, or individuals whose departure was recorded after their lawful period of admission expired. This could easily encompass individuals who stayed just a few days longer than the conclusion of their program to tie up their personal affairs and is not a true representation of the “overstay” population with which the administration is concerned. The “suspected in-country” overstay rate (individuals for whom no departure has been recorded) is in fact much lower than the figures cited by USCIS: 2.99 percent for F nonimmigrants, 2.94 percent for M nonimmigrants, and 2.42 percent for J nonimmigrants. In addition, as noted in the Executive Summary, determining lawful status is not a straightforward analysis:

¹³ PM-602-1060 at 2.

¹⁴ *Id.*

¹⁵ See <https://www.ice.gov/sevis/data-integrity>.

¹⁶ <https://studyinthestates.dhs.gov/2016/06/maintaining-accurate-sevis-records-when-to-request-a-correction-or-data-fix>

¹⁷ PM-602-1060 at 2.

¹⁸ See

<https://www.dhs.gov/sites/default/files/publications/Entry%20and%20Exit%20Overstay%20Report%2C%20Fiscal%20Year%202016.pdf>

¹⁹ PM-602-1060 at 2.

... [D]etermining lawful status is more complicated than solely matching entry and exit data. For example, a person may receive from CBP a six-month admission upon entry, and then he or she may subsequently receive from U.S. Citizenship and Immigration Services (USCIS) a six-month extension. **Identifying extensions, changes, or adjustments of status is necessary to determine whether a person is truly an overstay.**

In addition:

Valid periods of admission to the United States vary; therefore, **it was necessary to establish “cutoff dates” for the purposes of a written report.** Unless otherwise noted, the tables accompanying this report refer to departures that were expected to occur between October 1, 2015 and September 30, 2016....²⁰

In other words, due to limitations associated with producing a written report, DHS acknowledges that the “overstay” data in the report includes some individuals who were later granted permission to remain beyond their initial period of authorized stay. The fact that this data was inflated is confirmed by the fact that four months after the “cutoff dates,” the number of overstays substantially decreased:

Due to continuing departures and adjustments in status by individuals in this population, by January 10, 2017, the number of Suspected In-Country Overstays for FY 2016 decreased to 544,676, rendering the Suspected In-Country Overstay rate as 1.07 percent. **In other words, as of January 10, 2017, DHS has been able to confirm the departures or adjustment in status of more than 98.90 percent of nonimmigrant visitors scheduled to depart in FY 2016 via air and sea POEs, and that number continues to grow.**²¹

The report also concedes to other factors limiting its accuracy, such as its reliance on information from the Arrival and Departure Information System (ADIS). ADIS has limited capacity to record exits and entries made via land and makes no distinction of those who overstay one day versus one year or longer.²² Yet this is a significant difference, as a one-day overstay may be the result of a person missing their flight or sustaining an injury that renders them unable to travel.

Lastly, USCIS states that the new memo will “improve” how USCIS implements the unlawful presence ground of inadmissibility but fails to offer any reason or explanation as to how the new memo will accomplish that. In sum, USCIS has clearly failed to thoroughly consider the implications of its new unlawful presence interpretation, failed to adequately justify a need for the change, and has cited no concrete authorities to support its stated goals. The memorandum cannot stand under *Skidmore* deference.

E. The Memorandum Is a Legislative Rule that Requires Notice and Comment Rulemaking under the Administrative Procedure Act (APA)

The Administrative Procedure Act (APA) recognizes two types of administrative rules: legislative rules issued through formal notice and comment rulemaking, which are given the full force and effect of law, and interpretive rules designed to advise the public of agency interpretation of a legal rule. Interpretive rules do not require notice and comment and lack the force of law.²³ While the 2018

²⁰ *Id.* (emphasis added).

²¹ *Id.* (emphasis added).

²² *Id.*

²³ See *Perez v. Mortg. Bankers Ass’n*, 135 S. Ct. 1199, 1200-01 (2015).

memorandum purports to merely advise the public of how the term “unlawful presence” is to be interpreted, that conclusion is neither factually correct nor legally supported.

As noted above, over the course of two decades, USCIS has stood by its 1997 interpretation of unlawful presence, reiterating it most recently in 2009 when it undertook a comprehensive review of its various memoranda and case law on unlawful presence and issued consolidated guidance that ultimately became chapter 40.9.2 of the AFM. While we maintain that the 2018 memorandum, which erases the distinction between the concepts of “unlawful presence” and “violation of status” is unlawful, the APA requires USCIS to give the public advance notice and an opportunity to comment through formal rulemaking before attempting to impose what constitutes a change in how the law will be applied in the future.

While the courts have not developed a unified approach to evaluating whether a rule is legislative or interpretive, the reasoning of various decisions is instructive. Employing textual analysis, the Ninth Circuit has held that legislative rules “are those which effect a change in existing law or policy.”²⁴ Another critical characteristic of legislative rules is that they have general application.²⁵ Conversely, “interpretive rules are those which merely clarify or explain existing law or regulations.”²⁶ While a legislative rule is a broad wholesale change in interpretation and application of law, interpretive rules are used more for “discretionary fine-tuning than for general law-making.”²⁷ For example, in *Jean v. Nelson*, the Eleventh Circuit considered whether a blanket change in how INS treated arriving aliens [detention (new) vs. parole (old)] was a legislative or interpretive rule.²⁸ The court found that even though parole was still a discretionary option, the rule was legislative because it had general applicability, and did more than just clarify or explain an existing rule.²⁹ Because the rule created an entirely new procedure for all cases, notice and comment rulemaking was required.³⁰ Similar analytical approaches are found in *N.H. Hosp. Ass’n v. Azar*,³¹ and *Dia Navigation Corp. Ltd. v. Pomeroy*.³²

Applying this analysis, the 2018 memorandum is a legislative rule because it changes the manner in which unlawful presence is determined for all F, J, and M nonimmigrants who have been admitted “D/S” and is therefore of general applicability. It will result in future enforcement actions against persons under facts and circumstances that did not previously result in enforcement actions, thus doing far more than merely “explaining” an existing policy. Finally, it is a 180-degree change in the manner in which USCIS treats persons admitted for the duration of their status by conflating the fact (or even potential fact) of a status violation with the beginning of a period of unlawful presence.

F. USCIS Has Failed to Articulate a Satisfactory Explanation for its New Approach to Unlawful Presence as Required by *Encino Motorcars*

In *Encino Motorcars, LLC v. Navarro*, the U.S. Supreme Court reaffirmed several longstanding rules of administrative rulemaking, including the basic procedural tenet that agencies must give adequate

²⁴ *Alcaraz v. Block*, 746 F.2d 593, 613 (9th Cir. 1984).

²⁵ *Flagstaff Med. Ctr. v. Sullivan*, 962 F.2d 879, 886 (9th Cir. 1992).

²⁶ *Alcaraz*, 746 F.3d at 613; *Hector v. USDA*, 82 F.3d 165, 170-71 (7th Cir. 1996).

²⁷ *Alcaraz*, *Id.* at 613.

²⁸ 711 F.2d 1455 (11th Cir. 1983), *vacated in part as moot*, 727 F.2d 957 (11th Cir. 1984) (new regulations issued).

²⁹ 711 F.2d at 1476, 1478.

³⁰ *Id.* at 1478.

³¹ 887 F.3d 62, 72-73 (1st Cir. 2018).

³² 34 F.3d 1255 (3d Cir. 1994).

reasons for their decisions.³³ Citing *Motor Vehicle Mfrs. Assn. of United States v. State Farm Mut. Automobile Ins. Co. (MVMA)*, the Court stated that an agency “must examine the relevant data and articulate a satisfactory explanation for its actions including a rational connection between the facts found and the choice made.”³⁴ That requirement is satisfied when the agency’s explanation is clear enough that its “path may reasonably be discerned.”³⁵ In explaining its changed position, an agency must also be cognizant that longstanding policies may have engendered serious reliance interests that must be taken into account.³⁶ When an agency fails to provide even that level of minimal analysis, its actions are arbitrary and capricious and cannot carry the force of law.³⁷

As described in Part D, *supra*, and Part G, *infra*, the change in unlawful presence interpretation articulated in the 2018 memorandum is not supported by a reasoned explanation, eliminates a critical notice element, and fails to take into consideration fundamental fairness and due process requirements, as well as the reliance interests of the regulated public that have built up over the past two decades. For all of these reasons, the 2018 memorandum is an arbitrary and capricious change in interpretation that cannot stand.

G. The 2018 Memorandum Raises Significant Due Process and Fundamental Fairness Concerns and is Constitutionally Suspect

Unlike foreign nationals who are admitted until a “date certain,” and will trigger unlawful presence if they remain in the U.S. beyond the date recorded on Form I-94 (or recorded in CBP electronic systems), plus any extension thereafter granted, students and exchange visitors that are admitted for “D/S” lack the benefit of such a bright-line test. As a result, legacy INS and USCIS created a different bright-line standard, one that incorporates the principle of fundamental fairness: formal notification by USCIS or an immigration judge that a status violation occurred before the unlawful presence clock can start. The exceedingly harsh penalties associated with unlawful presence, and the clear distinctions Congress created between the concepts of unlawful presence and status violation, have informed more than 20 years of policy, which ascribes caution to calculating unlawful presence.

The new memorandum throws caution to the wind. The government’s new interpretation of unlawful presence raises serious due process concerns and is unfair and unworkable in its application. Since 1997, the Service has interpreted INA §212(a)(9)(B) as requiring some form of notice to individuals for unlawful presence to accrue. Under the 2018 memorandum, while the government’s finding that an F, M, or J nonimmigrant has violated status would still typically occur in the course of a USCIS benefits adjudication, the date on which unlawful presence will accrue is imposed retroactively. The 2018 memorandum instructs adjudicators to consider information in the systems available to USCIS, in the alien’s record, and alien’s admissions regarding his or her immigration history or other information discovered during the adjudication,” but provides no limitation as to how far back adjudicators may reach, such that a student or exchange visitor may abruptly learn that he or she has been unlawfully present for several years.³⁸ Moreover, the memo states that “an F-2, J-2, or M-2 nonimmigrant’s period of stay authorized ends when the F-1, J-1, or M-1 nonimmigrant’s period of stay authorized ends.” This means that a spouse may find out only many years after the fact that they too accrued unlawful presence.³⁹

³³ 136 S. Ct. 2117, 2125 (2016).

³⁴ 463 U.S. 29, 43 (1983).

³⁵ *Bowman Transp., Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 286 (1974).

³⁶ *Encino Motorcars*, 136 S. Ct. at 2126; *Perez*, 135 S. Ct. at 1209.

³⁷ See 5 U.S.C. § 706(2)(A); *MVMA*, 463 U.S. at 42-43.

³⁸ PM-602-1060 at 4 n.12.

³⁹ *Id.* at 5.

The regulation at 8 CFR §214.2(f)(5)-(6) articulates the circumstances in which an F-1 student is deemed to be “out of status.” F-1 students who work without authorization, who are deemed to not be pursuing a full course of study, who transfer to another school without permission, and who fail to complete a full course of study are deemed to be “out of status.” However, F-1 students are subject to additional reporting requirements that may constitute a status violation if not completed timely. These reporting requirements include: reporting biographical information to a Designated School Official (DSO) every six months during a STEM OPT extension;⁴⁰ and completing an annual self-evaluation report that is signed by the employer and submitted to the DSO within 1 year and 10 days of the validity period on the Employment Authorization Document, as well as a final evaluation within 10 days of the conclusion of the 24-month period of STEM OPT.⁴¹ Additionally, employers of STEM OPT students are required to report absences to the DSO; and any material change in a STEM OPT training plan must be reported to the DSO by the student after having the employer sign a new training plan.⁴² USCIS has not articulated whether the failure to undertake any of these actions would trigger the accrual of unlawful presence. The 2018 memorandum makes no distinction between minor technical violations (e.g. reporting a change in employment a few days late) versus a major violation (dropping all classes without authorization).

In practice, this policy will create a large class of inadmissible aliens who have received no notice of their unlawful presence because in many cases, F, M, and J nonimmigrants have no knowledge that a status violation has even occurred. In addition, a significant number of individuals will only become aware of a status violation when it is too late to correct course and they find themselves subject to a three- or ten-year bar to admissibility. Under the new memo, accidental and inadvertent status violations will subject unsuspecting individuals who have not acted in bad faith to extreme penalties. Examples of situations where students or exchange visitors may be found to have inadvertently violated their status include:

1. **Inadvertently Engaging in Unauthorized Employment.** While 8 CFR §214.2(f)(9) clearly states that a student may work on campus for up to 20 hours per week and requires authorization in the form of curricular or optional practical training to work off-campus in certain circumstances, there is no clear guidance on what constitutes “employment.” A student may believe that off-campus volunteer work is not unauthorized “employment” even though it is possible that the Service could view it as such, particularly if it involves activities that normally would be compensated. Other activities that are not clearly defined include working for and being paid by an overseas entity while physically present in the U.S.; selling something on eBay; selling personally created art work or photography; getting paid for publication of one’s dissertation; getting paid to host a seminar or speak at an academic conference or event; getting paid a royalty for activities associated with research, etc.
2. **Practical Training Issues.** Issues may also arise when a student on OPT drops below 20 hours of work one week, starts a degree program while on OPT, or works just a few days or one week beyond CPT.
3. **Inadvertently Violating Status by Following the Advice of a School or Designated School Official (DSO).** A school may err in advising a student, leading to an accidental status violation through no fault of the student. For example, a school may incorrectly advise a student as to the number of hours that he or she may work on campus, or incorrectly advise

⁴⁰ 8 CFR §214.2(f)(12).

⁴¹ 8 CFR §214.2(f)(10)(ii)(C)(9)(i).

⁴² 8 CFR §214.2(f)(10)(ii)(C)(6); and 8 CFR §214.2(f)(10)(ii)(C)(9)(ii).

a student to drop a class that causes the student to fall below a full course of study. A DSO may grant a reduced course load authorization in good faith, but SEVP or USCIS may later determine this authorization should not have been granted. Further, a program administrator may send a J-1 student physician to a training location that has not been approved or may improperly advise a student physician that he or she may moonlight doing non-GME work within the same training hospital.

4. **Extraordinary Circumstances Beyond One's Control.** Extraordinary circumstances can also cause a student or exchange visitor to unintentionally violate status. For example, in May 2018, an F-1 student on OPT was walking down the sidewalk in Denver when a car hit him and pinned him to a tree. His leg had to be amputated.⁴³ Under 8 CFR §214.2(f)(10)(ii)(E), he will be out of status as soon as he is unemployed for 90 days. If he is hospitalized for more than 180 days after the effective date of the new policy and after he falls out of status through no fault of his own, he will be subject to the three-year bar when he departs. Additionally, USCIS has never issued clear guidelines on maintaining status when on maternity leave.
5. **Dependents May Be Unlawfully Present Without Knowing It.** Since the status of dependents of F-1, J-1 and M-1 nonimmigrants depends upon the principal nonimmigrant maintaining his or her status, those family members (with the exception of children under the age of 18, who are statutorily exempt from accruing unlawful presence) would be out of status and unlawfully present upon a violation of the principal's status. Thus, a spouse who is unaware of a principal's status violation would become subject to serious immigration penalties without even knowing it. This could occur, for example, when the principal tries to hide his or her failure at school from an unknowing spouse or in an abusive situation.

By collapsing the distinction between “unlawful presence” and “status violation” and deeming unlawful presence to accrue retroactively, the 2018 memorandum removes the important procedural safeguard of notice to individuals that they may be deprived of a liberty interest. This lack of notice raises due process concerns. The Fifth Amendment's due process clause is a core concept in the Bill of Rights and requires all levels of American government to operate within the law, using procedures that are fundamentally fair. The core elements of due process are notice and a hearing before an impartial tribunal, which “minimize substantively unfair or mistaken deprivations” by providing individuals an opportunity to contest the basis on which the government seeks to deprive them of protected interests.⁴⁴ “An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.”⁴⁵

The three- and ten-year bars to admissibility represent a deprivation of liberty, as subject individuals are barred from returning to the United States for a lengthy period of time. In *Kent v. Dulles*, the Supreme Court held that the right to travel is a “liberty” interest protected by the Fifth Amendment and that where governmental restrictions on travel are involved, the Court will construe narrowly all delegated powers that curtail or dilute them.⁴⁶ Moreover, the constitutional guarantee of due process is not limited to U.S. citizens but applies equally to all “persons” present in the United States, regardless of alienage or immigration status.⁴⁷

⁴³ <http://kdvr.com/2018/05/03/25-year-old-man-sedated-and-on-ventilator-following-crash-in-lone-tree/>

⁴⁴ *Fuentes v. Shevin*, 407 U.S. 67, 81 (1972).

⁴⁵ *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

⁴⁶ 357 U.S. 116 (1958).

⁴⁷ *Plyler v. Doe*, 457 U.S. 202 (1982).

The Supreme Court has held that in applying the Fifth Amendment's due process guarantee, one must balance the private interests of affected individuals with the government's interest. In *Mathews v. Eldridge*, the Court indicated that the identification of the specific dictates of due process generally requires consideration of three distinct factors:

[F]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and, finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.⁴⁸

Applying the *Eldridge* test to the aforementioned examples of cases where students may inadvertently violate their status illustrates the problems inherent in the new interpretation of unlawful presence. Take, for example, a student who inadvertently violates F-1 status by engaging in activities later deemed to have constituted unauthorized "employment." First, the student has a private interest that will be affected by the application of the new policy to his case, given that he will likely have accrued sufficient unlawful presence at the time the determination is made to trigger a three- or ten-year bar upon departure from the United States. Second, the lack of legal guidance on what constitutes "employment" creates a significant likelihood of an erroneous deprivation, and the additional procedural safeguards, which previously existed in the form of notice before deeming the accrual of unlawful presence to have commenced, no longer exist. Third, although the government may have a compelling interest in enforcing the immigration laws and in implementing policies to minimize overstay, the policy at issue in this case does nothing to further that interest. As outlined above, the 2018 memorandum will severely penalize individuals for status violations that were unintentional and of which they were likely unaware until it is too late. It is precisely this risk of the erroneous deprivation of a liberty interest that is at stake in application of the 2018 memorandum. This new approach to unlawful presence is devoid of fundamental fairness and is constitutionally suspect.

H. Conclusion

For these reasons, we urge USCIS to abandon this misguided directive and to maintain the unlawful presence guidance that has been in place for decades. It is critical that USCIS ensure that fundamental fairness is a critical component in interpreting and implementing the unlawful presence statute.

Sincerely,

THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION
THE AMERICAN IMMIGRATION COUNCIL

⁴⁸ 424 U.S. 319, 335 (1976).



Kathy M. Foley
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June 11, 2018

Submitted via email to: publicengagementfeedback@uscis.dhs.gov
Re: **Accrual of Unlawful Presence and F, J, and M Nonimmigrants (PM-602-1060)**

Dear USCIS,

I am writing in regard to the recommendations made in “**Policy Memorandum: Accrual of Unlawful Presence and F, J, and M Nonimmigrants (PM-602-1060)**.” These proposals represent a radical change in USCIS’s interpretation and application of the regulations related to the accrual of unlawful presence by those in student (F nonimmigrant), exchange visitor (J nonimmigrant), or vocational student (M nonimmigrant) status and their dependents while in the United States.

I work for **Middlebury College** and its many academic programs, including our graduate school, the **Middlebury Institute for International Studies**. We have many international students from more than 75 nations and faculty and staff from across the globe. We have demonstrated a long-standing commitment to international education and engaging international students and scholars in our community. The international students, researchers, staff and faculty on our campuses bring unique experiences and perspectives to our classrooms, important ideas and diverse approaches to our research projects, and exciting and dynamic leadership and perspectives to our campus community.

As a PDSO (Principle Designated School Official) and RO (Responsible Officer), I was alarmed to read about the proposed changes with regard to “unlawful presence”. Much of my daily work and that of the International Student & Scholar Services (ISSS) team consists of advising international students and scholars on how to maintain their visa status (and that of their dependents). This is something that the vast majority of international students deeply and sincerely want to do, and this means they need to remain aware of visa regulations while also balancing the demands all students and employees experience along with their institution’s requirements.

There have been significant discussions amongst DSOs and Alternate Responsible Officers (AROs) since the release of this memorandum regarding how we will assist F/J/M visa holders in understanding these new policies without inadvertently engaging in the unauthorized practice of law. (*It is important for us to stay clear about our role.*) While changes in regulations are to be expected, these proposed changes to interpretation of the regulations are especially problematic. They are a departure from the long-standing, common-sense interpretation of visa regulations that has been in place for over 20 years. This new approach creates a system where F/J/M visa holders may be found to have violated their visa status years after the violation supposedly occurred. This is especially troubling since this memorandum attaches the possibility that this violation could result in individuals being barred from entering the U.S. for three years, ten years, or permanently.

Although the announcement regarding these changes comes with sufficient notice for individuals who are currently out of status to take steps to remedy their visa status before they begin accruing unlawful presence, this new interpretation will cause a great deal of uncertainty for F/J/M visa holders moving forward.

Here are some specific examples of some problems DSOs/AROs foresee with the implementation of the concepts outlined in the memorandum.

1. **Recent SEVP Portal Release:** SEVP recently implemented a Portal through which F-1 students on post-completion optional practical training (OPT) or STEM OPT are allowed to report changes to their personal and/or employment information, but there have been issues with the system. Students are required to report these changes within ten days, but periodic problems with SEVIS and the Portal have resulted in incomplete information being available to students and instances when students have not been able to access the Portal. Additionally, some students have been confused about what information to enter and how to correctly enter it. All of this has resulted in incomplete and inaccurate data being reported to SEVIS through the Portal despite the best efforts of F-1 visa holders to report their information. Therefore, if USCIS relies on information from SEVIS (something the Policy memo mentions as a likely source of information for making decisions about violations of status), it is likely that there will be students judged to have violated their status based on this bad data.

While DSOs/AROs and others have, historically, been able to help students resolve these data issues, the new interpretation of the regulations could mean that these student could be judged to have violated their status and could be accruing unlawful presence without realizing it.

2. **Changes to Regulations Causing Previously Approved Actions to Become Violations:** The student and scholar visa system (SEVIS) is set up so that school officials bear a great deal of responsibility for assisting F/J visa holders to maintain their status. As DSOs/AROs, we do our best communicate with our students when there are changes to visa regulations and regulatory interpretations. This is not an easy task—especially when changes to regulations or regulatory interpretations require that we tell students something that is the reverse of what we previously correctly advised them.

Recently USCIS announcement restricting 3rd party employment for students on STEM OPT. In situations like that, it is very possible that students will believe that they have done everything necessary to comply with the rules. Yet, when they apply to renew a visa or to change visa status in the future, they could be told that their actions (permissible when they started, but now not allowed due to changes in regulatory interpretations) were a violation of their status. They may then discover that they been determined to have since accrued unlawful presence, barring them from changing visa status or re-entering the U.S.

These are only two recent examples of actions that could result in international students accruing unlawful presence despite their attempts to follow the rules. We foresee many additional problems and unintended consequences that will result from such a large and dramatic shift in regulatory interpretation.

In conclusion

The USCIS press release for this memorandum quotes USCIS Director L. Francis Cissna as saying, *“USCIS is dedicated to our mission of ensuring the integrity of the immigration system. F, J, and M nonimmigrants are admitted to the United States for a specific purpose, and when that purpose has ended, we expect them to depart, or to obtain another, lawful immigration status.”* This change, however, will not contribute meaningfully to that objective. Instead, it will likely result in confusion that will mean that well-meaning international students and exchange visitors could be found to have accrued unlawful presence due to innocent mistakes or misunderstandings of changing regulations. **Due to the strict bars that will be applied to these individuals due to these changes, these misunderstandings could have severe consequences.**

We are at a point in time where our international students can choose to study anywhere in the world. Many international students who enroll at U.S. institutions are the best in their schools at home, and they receive offers to attend institutions around the world. They choose to come to the United States because they have determined an institution is the best option for them to pursue their chosen field of study. While here, they excel in their classes, and they provide new perspectives and experiences to their classmates and the broader higher education community.

If we want to ensure the students fulfill the “specific purpose” when they receive their visa (obtaining an education at a U.S. institution), we must ensure our laws and regulations are structured and implemented in a fair and transparent manner. We must work to limit uncertainty so that students can focus on learning instead of tracking constantly changing regulations. **This new policy has the opposite result.**

Recommendations

I urge you to take these concerns into consideration and rather than making the proposed changes, consider the following recommendations suggested by NAFSA (Association of International Educators).

For additional contextual details, see the NAFSA Letter to Director Cissna at [http://www.nafsa.org/ /file/ /amresource/NAFSAulpcomment20180524.pdf](http://www.nafsa.org/file/amresource/NAFSAulpcomment20180524.pdf).

- **Leave in place the current policy, which has served for over 20 years.** Neither DHS nor legacy INS ever published regulations to implement this important area of law. If the agency wishes to implement such a drastic change to long-standing, common interpretation of the law, it should be done through the notice and comment process.

I note a few related issues below:

- Under current policy, which has been in place for 20 years, the unlawful presence count begins only after a formal finding of a status violation by a DHS officer in the course of a benefits application, or by an immigration judge in the course of removal proceedings.
- Under the newly proposed policy, the unlawful presence count begins the day after the status violation, which could be discovered well after the passing of 6-months due to USCIS processing delays and other reasons.
- Under both the current and proposed policies:
 - Remaining in the United States beyond the expiration of a date-specific Form I-94 also starts the unlawful presence clock; yet
 - there are a number of important exceptions (such as unlawful presence not being counted if USCIS approves a student's application for reinstatement).
- **Do not implement any policy change until implementation has been fully coordinated with the Department of State and other DHS units such as CBP and SEVP.** It is unclear how this new interpretation will affect enforcement actions, admission protocols, SEVP records, and visa eligibility. It is imperative that you address these concerns before implementation of this proposal (scheduled to take effect August 9, 2018).
- **Exclude from the unlawful presence count any status violations that occurred under color of law, to avoid “gotcha” scenarios, where the student reasonably relied on the authorizations granted.** For example, curricular practical training (CPT) authorized in SEVIS that DHS later determines may have been improperly given, should not start the unlawful presence “clock” until DHS or an immigration judge makes a formal status determination.
- **Apply the change of status/extension of stay tolling rules to reinstatement applications.** Currently, individuals may apply for reinstatement based on particular timeframes that may no longer be valid under the new interpretation.
- **Expand the sections describing examples where F, J, and M nonimmigrants “do not accrue unlawful presence in certain situations.”** See (draft) Adjudicator’s Field Manual 40.9.2(b)(1)(E)(iii). (See <https://www.uscis.gov/ilink/docView/AFM/HTML/AFM/0-0-0-1/0-0-0-17138/0-0-0-18383.html>)

Thank you for providing us with the opportunity to comment.

Sincerely,



Kathy M. Foley
Associate Dean/Director of International Student & Scholar Services
SEVIS Principle Designated School Official (PDSO)/Responsible Officer (RO)
Middlebury College and Middlebury Institute of International Studies at Monterey

Erickson

IMMIGRATION GROUP

June 11, 2018

Via Email

Mr. L. Francis Cissna, Director
Department of Homeland Security
U.S. Citizenship & Immigration Services
20 Massachusetts Avenue, NW
Washington, DC 20529

Sent to: publicengagementfeedback@uscis.dhs.gov

RE: USCIS Policy Memorandum: Accrual of Unlawful Presence and F, J, and M nonimmigrants

Dear Director Cissna:

Erickson Immigration Group ("EIG") writes in response to the U.S. Citizenship and Immigration Services (USCIS) policy memorandum dated May 10, 2018, "Accrual of Unlawful Presence and F, J, and M Nonimmigrants."

The memo is an abrupt and radical departure from more than 20 years of policy guidance. EIG requests that USCIS withdraw the memo due to the negative impact to the foreign exchange program and detriment to the U.S. economy. Implementing the revised policy as planned on August 9, 2018, would hinder efforts to attract talented individuals from around the world and could create undue harm to students, their families, academic institution, state resources, and broader community interests.

The proposed change is logistically complex and may lead to inappropriately identifying a large number of foreign students and exchange visitors as failing to maintain lawful nonimmigrant status, thus unfairly subjecting them to the 3-year, 10-year, or even to permanent bars to re-entry to the United States, based on an oversight or unintended circumstance which they may not be aware.

EIG represents multi-national employers that have an interest in and benefit from foreign students, often F-1 students on CPT, OPT, or STEM-OPT work authorization or J-1 exchange visitors as interns or trainees. EIG also has an interest in preserving the policies and legal principles that promote certainty and fair adjudication of immigration benefits.

The new memorandum would reverse USCIS practice and interpretation of how one accrues "unlawful presence," as defined under section 212(a)(9)(B)(ii) of the Immigration and Nationality Act (INA), referencing an individual who "is present in the United States after expiration of the period of stay authorized by the Attorney General or is present in the United States without being admitted or paroled." For nonimmigrant students and exchange visitors in the F, J, and M categories, legacy Immigration and Naturalization Service (INS) and USCIS have interpreted the statutory unlawful presence provisions to require notice to the individual of a status violation prior to the commencement of the unlawful presence clock. Such notice is provided in the context of the adjudication of a request for an immigration benefit by USCIS or a determination of a status violation by an immigration judge.

VIRGINIA [REDACTED] | [REDACTED] | Arlington, VA [REDACTED] | p [REDACTED] | f [REDACTED]

CALIFORNIA [REDACTED] | [REDACTED] | San Francisco, [REDACTED] | p [REDACTED] | f [REDACTED]

EIGLAW.COM

Current and historical USCIS guidance articulating this position states, “It must be emphasized that the accrual of unlawful presence neither begins on the date that a status violation occurs, nor on the day on which removal proceedings are initiated.”¹ **This longstanding policy provides certainty in determining when unlawful presence begins to accrue, while the new policy eliminates this practice.**

The new policy set out in USCIS’s May 11 2018 memo deems that unlawful presence starts accruing the day after the date that a status violation occurs, thus removing the critical procedural safeguard of providing notice to affected individuals that may find themselves subject to the three- and ten-year bars to admissibility. If this policy is implemented, those affected will have little to no opportunity to dispute or remedy the stated violation. This raises serious questions regarding fundamental fairness and due process and will have a significant negative impact on the student, vocational, and exchange visitor communities. Essentially, the new policy memo removes the longstanding and complex distinction between nonimmigrant “status violation” and when one accrues “unlawful presence.”

In recognition of the complexity and fluidity of academic programs, F, M, and J nonimmigrants are not admitted to the U.S. until a certain or specific date. Instead, they are admitted for the “duration of their status,” or “D/S,” which means the student or exchange visitor can remain in the United States as long as they maintain their nonimmigrant status. This generally means the student must maintain a full course of study or remain in the exchange program, not engage in unauthorized employment or other unauthorized activities, and complete the academic or exchange program in a timely manner or obtain an extension.

The new memorandum fails to address the complex and nuanced issues that determine whether an individual violated their nonimmigrant status. Students and exchange visitors can accidentally and unknowingly violate their status by dropping slightly below a full course of study, or by engaging in innocent, but unauthorized activity, including volunteer activities. For example, F-1 students are permitted to engage in work at a “qualifying on-campus job” for up to 20 hours per week while school is in session. Therefore, an F-1 student who inadvertently exceeds the 20-hour limit by just a couple of hours has technically violated his or her student status. In addition, a Designated School Official may make a good faith error in advising a student by authorizing a reduced course load that should not have been approved, thereby leading the student to unknowingly and unintentionally violate their status. This unfairness is compounded when the status violation also serves as the “trigger” for the accrual of unlawful presence by dependents of students and exchange visitors.

Other scenarios where a student might unintentionally or unwittingly have a lapse of status include:

- A science student volunteers in a professor’s lab
- A student is authorized on CPT or OPT and some government official later decides the work wasn’t sufficiently related to the degree
- A student gets into car accident and withdraws from a course late or fails to register
- A pregnant female takes maternity leave on OPT

This memo eliminates the long-held distinction between violating immigration status and being unlawfully present in the United States. The concept of “unlawful presence” with various “clocks,”

¹ See USCIS Memorandum, Consolidation of Guidance Concerning Unlawful Presence for Purposes of Sections 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I) of the Act,” (May 6, 2009), *available at* <http://www.aila.org/infonet/uscis-consolidation-guidance-unlawful-presence>.

“tolling” provisions, and “bars” has to this point been the purview of immigration law specialists and law school classes. Immigration policy is incredibly complex, and already has dire consequences for violation. Foreign students, scholars, and exchange visitors are not immigration attorneys or policy professionals and it is unfair to treat them as such. Unlawful presence should only trigger when there is clear notice of remaining beyond an expiration date of authorized stay in the United States and not when there is a contestable allegation of violation of status.

Based on feedback from our clients, this proposal seems to make the United States less attractive to talented international students, scholars, and exchange visitors and undoubtedly will encourage them to look elsewhere to do their groundbreaking research and build diplomatic ties. Foreign students, scholars, and exchange visitors are here to learn, and they make America safer by becoming the nation’s best ambassadors and allies. By treating them all as criminals for minor or technical violations, we will be making America less safe and a less desirable place to study. This is contrary to our nation’s values as a welcoming nation of immigrants.

The current policy has held up for more than 20 years because it provides bright-line dates established in government systems, which give adequate notice to students and exchange visitors and their schools and exchange programs, and an opportunity to rectify inadvertent, innocent or misconstrued errors.

While an alien who violates his or her nonimmigrant status is certainly removable, the policy in place distinguishes between status violations and unlawful presence makes sense for purposes of applying INA 212(a)(9)(B), from both legal and public policy viewpoints. A clear government determination, whether it is the expiration date on a nonimmigrant’s Form I-94, or a formal finding of a status violation made in the course of a DHS benefits determination or by an immigration judge, serves as a fair and clear warning to an alien that the clock is ticking, and he or she just take action to leave the United States or otherwise cure the status deficiency. An alien, who persists after such fair notice, must face the possibility of not being able to return to United States for either 3 or 10 years.

Nonimmigrant status is a legal condition, not a physical thing. It is also dynamic, not static, which means that a person’s nonimmigrant status must be acquired and maintained, and can be changed, or lost, and in some circumstances, reinstated. In many respects, nonimmigrant status is a relationship with the U.S. immigration system, with actions, events, and data in the “real” world contributing to the acquisition and maintenance, change, loss, or restoration, of the nonimmigrant relationship. In addition, a student or exchange visitor might not even know about any violation of status until an immigration officer at a Port of Entry decides a violation occurred in the past and bars entry to begin or return their activities.

In lieu of implementing the policy described in the memo, EIG recommends that you leave in place the current policy, which has served for over 20 years. Neither DHS nor legacy INS ever published regulations to implement this important area of law.

We thank you for the opportunity to comment.

Sincerely,



Erickson Immigration Group

Jenny T. Dao
Attorney

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June 11, 2018

Mr. L. Francis Cissna, Director
U. S. Citizenship & Immigration Services
Department of Homeland Security
20 Massachusetts Avenue, NW
Washington, DC 20529

Submitted via email: publicengagementfeedback@uscis.dhs.gov

RE: PM-602-1060 - Policy Memo: Accrual of Unlawful Presence and F, J, and M Nonimmigrants

Dear Director Cissna:

We are writing on behalf of Boston University (F-1 sponsor number: BOS 214F00056000) with respect to the U.S. Citizenship and Immigration Services (USCIS) policy memorandum of May 10, 2018: PM-602-1060 "Accrual of Unlawful Presence and F, J, and M Nonimmigrants."

Boston University is a large research university sponsoring over 9,700 international students, primarily in F-1 and J-1 status, as well as over 1,300 academic scholars and faculty in H-1B, J-1, and other statuses. We are a member of the Association of American Universities (AAU), a consortium of distinguished U.S. research universities promoting education and academic research, and was ranked 12th in the U.S. for institutions hosting the largest number of international students according to the *2017 Open Doors* Report by the Institute of International Education (IIE). Our international students and scholars contribute significantly to the intellectual vitality of the United States, and we take seriously our responsibility to guide our international community in abiding by all appropriate laws.

We also recognize the important role USCIS plays in ensuring that visitors to the United States are lawfully present. Your work benefits both visiting scholars and Americans alike. However, we are seriously concerned by the fundamental change in policy USCIS has proposed in which the immigration status of F, J, and M nonimmigrants would be calculated, creating a misplaced overreliance on information entered into the Student and Exchange Visitor Information System (SEVIS) to determine whether individuals are in violation of their immigration status and therefore unlawfully present in the United States without an official determination of such status by the Department of Homeland Security, an immigration judge, or Board of Immigration Appeals.

Key Concerns of the Policy Change

- 1. The new policy obscures and conflates the important distinction between "unlawful presence" – illegal presence in the United States – and "maintenance of status". Furthermore, it appears to rely on systems that serve only as status indicators.**

For many nonimmigrants, the date-certain I-94 or document expiration date, give a clear "bright line" indication at the time of U.S. admission regarding the length of permitted stay. Most F, J, and

M nonimmigrants are admitted for “D/S” (“duration of status”) which denotes a careful balance of maintaining unexpired documents, keeping an active and valid immigration record, and following detailed guidelines related to academic activities, employment and reporting deadlines.

There are several documents and systems that serve as status indicators for F, J, and M nonimmigrants. These may include: (1) a Form I-20 or DS-2019, (2) an electronic immigration record in the Student and Exchange Visitor Information System (SEVIS), (3) a passport stamp showing entry to the U.S. for duration of status or until a date certain, and (4) an electronic I-94 record.

Given the complexity of system interfaces and inconsistency between documents that are used as immigration status indicators, it may not always be immediately clear to a nonimmigrant student or exchange visitor in F, J, or M status that their immigration status is in jeopardy at the time that a technical violation of status occurs. However, these “unlawful presence” situations can be triggered by technical, unknown, and unintentional oversights. For example, a student or exchange visitor may not be immediately aware:

- If their SEVIS record is terminated whether by batch reporting or manually by a school official, whether in accordance with regulations or in error.
- If their I-94 record is not extended to D/S following a timely response to an I-515A.
- If USCIS approves incorrect dates on an Employment Authorization Document for Optional Practical Training, requiring a lengthy correction process to the EAD and/or SEVIS record.
- If the USCIS-SEVIS CLAIMS interface inadvertently completes a SEVIS record early when an H-1B petition is approved for a future start date.

2. Accrual “clock” would begin without a government finding:

Apart from scenarios where a student may not be immediately aware of a status infraction, the new memo also does not account for situations where a government agency may, after review and evaluation, make a determination that a past action falls short of a regulatory requirement.

For instance, SEVP has struggled for years to develop systems to accurately capture dates and data on OPT employment. While the recently launched SEVP Portal now allows greater functionality and transparency in this area, there is still a high degree of subjective review that might occur when evaluating the appropriateness or major-relatedness of employment.

It is extremely worrisome that a student may now face the risk of retroactive bars if the employment to which they entered in good faith may later come under extreme or prejudicial review. For instance:

- If the student reports employment during Optional Practical Training job that is later determined not to be directly related to their major field of study.
- If a student continues to work in good faith on the basis of a timely-filed pending application for STEM OPT extension, but the application is later denied by USCIS on the basis of a change in interpretation related to employer-employee relationships.
- If a student participated in a curricular activity that is later determined after evaluation to require CPT authorization.

Because of this complexity of evaluating and determining lawful status in these and similar cases, a student or exchange visitor might not even know they are “out of status” until a formal evaluation is made or communicated to them by a government agency.

3. Retroactive penalty for students who seek reinstatement or status correction:

Under the proposed new policy, students who choose to utilize the F-1 reinstatement process as an avenue for legal appeal risk a lengthy adjudication process, the current reality of extreme adjudications, and the significant penalty of a 3-year or 10-year bar if their case is denied. Given that applications for reinstatement are currently taking 10-13 months for adjudication, this avenue has become nearly obsolete. Out of more than 9,700 international students at Boston University, less than a handful have opted to apply for reinstatement in the last two years. Most of these students were students who were not able to travel abroad due to war, travel bans, or other extreme personal, health, or financial circumstances.

Under the new policy, virtually all students who apply for reinstatement would risk the possibility of a 3-year or 10-year bar from the U.S. A student who is denied reinstatement, and then is unable to rectify their legal status by travel, loses the ability to complete their U.S. degree. We believe this would render reinstatement essentially unusable as a legal avenue.

SUMMARY RECOMMENDATION

We join NAFSA and many other national organizations in strongly recommending that USCIS continue its current policy of not begin the unlawful presence “clock” until after a notice of finding is made by a government agency. Unlawful presence should only be triggered when there is clear notice of remaining beyond an expiration date of authorized stay in the United States and not when there is a contestable allegation of violation of status. By implementing the proposed policy, the United States risks making our country less attractive to talented students, researchers, and scholar who have for decades spurred impactful economic opportunities and meaningful innovations for our communities. We urge USCIS to reconsider its plan for such an extreme policy change.

Thank you for the opportunity to submit comments on the PM-602-1060 - Policy Memo: Accrual of Unlawful Presence and F, J, and M Nonimmigrants.

Respectfully,



Jeanne E. Kelley
Managing Director
Boston University Global Programs
International Students and Scholars Office



June 11, 2018

Lee Francis Cissna, Director
Department of Homeland Security
U.S. Citizenship and Immigration Services
Washington, D.C.

Dear Director Cissna:

The Council for Global Immigration (CFG I) and the Society for Human Resource Management (SHRM) submit these comments regarding the recently issued USCIS policy memorandum, "Accrual of Unlawful Presence and F, J, and M Nonimmigrants" (PM-602-1060). CFG I and SHRM respectfully request the agency to withdraw this memorandum and ensure that the agency's policy toward unlawful presence continues to align with our principles of fairness, innovation and competitiveness.

CFG I, founded in 1972 as the American Council on International Personnel, is a strategic affiliate of SHRM. It is a nonprofit trade association comprised of leading multinational corporations, universities, and research institutions committed to advancing the employment-based immigration of high-skilled professionals. CFG I bridges the public and private sectors to promote sensible, forward-thinking policies that foster innovation and global talent mobility.

SHRM is the world's largest HR membership organization devoted to human resource management. Representing more than 285,000 member employers in over 160 countries impacting 116 million employees, the Society is the leading provider of resources to serve the needs of HR professionals and advance the professional practice of human resource management. SHRM has more than 575 affiliated chapters within the United States and subsidiary offices in China, India and United Arab Emirates.

I. Background and Impact

The new USCIS policy memorandum, "Accrual of Unlawful Presence and F, J, and M Nonimmigrants," purportedly aims to get at the very real problem of visa overstays, a legitimate concern that needs to be addressed. However, in doing so, the agency conflates visa overstays with violation of status, a separate problem for which there are other means to correct that do not require the extremely harsh penalty of accrual of unlawful presence, which can result in 3- and 10- years bars to entry into the United States.

CFG I and SHRM do not minimize the problem of violation of status, but we also do believe that USCIS should provide notice to foreign nationals and their employers of such violations of status and allow any appeals and rebuttal processes to run their course before assigning unlawful presence to foreign nationals.

II. The Public Should Have Adequate Opportunity to Comments Under the Administrative Procedure Act for any Change to Unlawful Presence Policy

While we appreciate the opportunity to comment on this policy in an informal way, we believe that any significant change to the policy on unlawful presence should undergo formal notice and comment rulemaking. We have heard Director Lee Francis Cissna, on numerous occasions, express a commitment to the Administrative Procedure Act (APA) for significant policy changes. We respectfully submit that a change such as this (a change to the Adjudicator's Field Manual intended to have the force of law) is exactly the type of change that should be subject to the APA. Among other requirements under the APA, USCIS should conduct a full cost-benefit analysis of the new policy with a chance for the public to comment¹ and fully engage with the Student and Exchange Visitor Program (SEVP), Departments of State (DOS), Immigration and Customs Enforcement (ICE) and Customs and Border Protection (CBP) and other interested agencies as the Office of Management and Budget (OMB) coordinates under the APA.

III. The Memorandum Abandons the Fundamental Fairness of the Prior Unlawful Presence Policy

Our principles call for an immigration system that is fair, innovative, and competitive. With regard to fairness, we recognize the need to adopt policies that protect and develop the U.S. workforce. However, the system must also be fundamentally fair, which includes official notice of any status violations and opportunities to rebut or appeal as appropriate.

The primary reason the agency should retain the current unlawful presence policy is that it targets those who truly have overstayed their status with no intent to maintain it and provides fair notice to another category of people – those for whom USCIS determines some sort of violation of status has occurred, intentionally or unintentionally. In developing the current policy, former INS Acting Executive Associate Commissioner Paul Virtue notes that the policy was developed for “reasons of practicality and fundamental fairness.”²

Since the issuance of the new memorandum, various scenarios have been presented to us from our members that show how the new policy would violate the principles of fundamental fairness. Several categories of individuals could inadvertently accrue unlawful presence under the new memorandum, only to learn after the fact that they have done so, including:

- Curricular practical training - A medical student who is asked by a supervisor to work a couple extra hours one weekend, inadvertently exceeding the 20-hour a week limit for curricular practical training in a high-pressure situation, only to have that violation pointed out in a later H-1B filing;

¹ For instance, while we take the issue of visa overstays very seriously, we have heard some concerns from our members that information from the Student and Exchange Visitor Information System (SEVIS), UCSIS CLAIMS and other systems might not be entirely reliable when calculating the number of overstays. The public should be given a full opportunity to provide such feedback under the APA. Additionally, the DHS Office of the Inspector General has outlined its own concerns over the calculation of overstays in its May 1, 2017 report “DHS Tracking of Visa Overstays is Hindered by Insufficient Technology” available at https://www.oig.dhs.gov/sites/default/files/assets/2017/OIG-17-56-May17_0.pdf.

² Forbes, “USCIS Policy Change Could Bar Many International Students,” June 1, 2018, available at <https://www.forbes.com/sites/stuartanderson/2018/06/01/uscis-policy-change-could-bar-many-international-students>

- F-1 students - A student on F-1 optional practical training (OPT) whom USCIS determines was in violation of status a later date (for instance, in an H-1B petition) due to a USCIS interpretation of OPT rules for which the employer and student were not aware. This example is particularly acute at the moment given new rules regarding OPT and third-party placement on the USCIS website;
- Exchange visitors - Minor deviations from the scope of exchange visitor activities that come up in a Department of State site visit that are subsequently remedied by the sponsor, host and participant; and
- F-2 and J-2 spouses and children – These dependents could accrue unlawful presence for violations of the F-1 and J-1 visa holders that they had no way of which to be aware.

There are other scenarios due to government error that could occur:

- OPT to H-1B - A student who graduates, applies for and is granted 12 months of OPT for whom an employer gets an approved H-1B for consular processing but is unable to travel to get the H-1B abroad for seven months and continues to work on OPT, which need not be terminated until the individual receives his H-1B. In the H-1B visa appointment overseas, the student is told that USCIS CLAIMS terminated the F-1 record erroneously as if the H-1B petition was a change of status. Therefore, the student has been working without authorization, and accrued unlawful presence status for 7 months, and could be barred from entering the US on any visa for three years.
- J-2 to H-4 - A J-2 dependent works on an EAD valid for 12 months. The husband applies for change of status to H-1B – and USCIS processing time says 9 months – so the J-2 continues to work on the EAD for only seven months just to be safe. When home on vacation two years later, the H-4 (former J-2) is told that her husband's H-1B application was approved much earlier – and the J-2 worked without authorization for several months because the SEVIS record was terminated with the Change of Status – even though she had a valid EAD. Her unlawful presence has been tolling for over a year, and she could be barred from entering the US for ten years.

It is also unclear how the memorandum will account for “data fixes” through the Student and Exchange Visitor Information System (SEVIS) Help Desk. Since the inception of SEVIS, Student and Exchange SEVP guidance has directed Designated School Officials (DSO) registered in SEVIS to correct minor infractions through an action called a data fix. These events are not uncommon. With most cases, the SEVIS Help Desk makes the students F-1 record active and valid nunc pro tunc in cases such as the following:

- Mistaken record completion - The DSO mistakenly completes a record, which means the student has remained in the United States beyond the end date of the program, and may have been working on campus without F status.
- Lack of extension - The DSO mistakenly forgets to extend a record, with the same consequences listed above.
- Premature transfer date - The DSO mistakenly enters an incorrect, premature F-1 school transfer release date during a period of OPT. The student is unaware that the OPT permission has been removed by this action, and works without authorization.

Additionally, while we thank USCIS for accounting for and not penalizing F-1 students who are properly reinstated pursuant to 8 CFR 214.2(f)(16), the memo does not appear to account for J-1 reinstatements. DOS outlines procedures for a responsible officer or alternate responsible officer to correct minor or technical infractions, as well as a process for DOS to approve reinstatements for individuals who have substantive infractions as specified in 22 CFR Part 62.45. We recommend that USCIS also account for J-1 reinstatements and ensure that Exchange Visitors will not be negatively impacted if they are properly reinstated via the procedures established in 22 CFR Part 62.45.

IV. The New Unlawful Presence Policy Inhibits the Ability of U.S. Employers to Compete and Innovate

With regard to innovation and competitiveness, our principles call for an immigration system that provides solutions that increase system effectiveness and predictability while creating and boosting U.S. economic growth and innovation. The new policy fails on both accounts.

Rather than an innovative solution that increases effectiveness and predictability, the policy would decrease the practicality achieved in the original Paul Virtue memorandum and vastly reduce the predictability in the current system. When students and exchange visitors in all of the scenarios above can be charged with unlawful presence for years without any notice or due process, employers will lack the predictability they need to meet deadlines and complete projects in which students on OPT are participating, and organizations are at risk of being unable to, among other activities, host interns and trainees.

Furthermore, the policy makes U.S. employers less competitive on the world stage, as it could cause talented foreign students who have committed no major immigration violations to become inadmissible for a period of 3- or 10-years. Additionally, it could cause other talented foreign students to forgo an education in the United States in the first place, seeing the immigration system as unpredictable and riddled with unfair pitfalls.

CFGI and SHRM thank USCIS for continued opportunities to comment on issues of such critical importance to U.S. employers. We request this memorandum to be pulled for the reasons stated above. If this policy is pursued further, we respectfully request that it be done through APA notice and comment rulemaking. We look forward to working with you.

Sincerely,



Lynn Shotwell
Executive Director
Council for Global Immigration



Mike Aitken
Senior Vice President, Government Affairs
Society for Human Resource Management



Dartmouth College • Office of Visa and Immigration Services

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June 11, 2018

Lee Francis Cissna, Director
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
20 Massachusetts Avenue, NW
Washington, DC 20529-2140

Submitted via email: publicengagementfeedback@uscis.dhs.gov

Re: USCIS Policy Memorandum: Accrual of Unlawful Presence and F, J and M
Nonimmigrants

Dear Director Cissna,

Dartmouth College submits these comments regarding the recently issued USCIS policy memorandum, "Accrual of Unlawful Presence and F, J, and M Nonimmigrants" (PM-602-1060) posted by USCIS on May 11, 2018.

Founded in 1769, Dartmouth is a member of the Ivy League. Dartmouth is committed to providing the best undergraduate liberal arts experience, and outstanding graduate programs in the Geisel School of Medicine, the Thayer School of Engineering, the Tuck School of Business, and the Guarini School of Graduate and Advanced Studies. Dartmouth sponsors international F-1 students as well as non-degree students, research scholars, visiting faculty and other visitors on our J-1 Exchange Visitor Program.

As both an F and J program sponsor, Dartmouth is deeply concerned by the agency's abrupt and significant departure from current policy guidance on unlawful presence and how it is determined for F and J nonimmigrants. Under the proposed changes, F and J nonimmigrants can be charged with unlawful presence for years without any notice or due process based on an unknowing or inadvertent violation of immigration status. This puts F and J nonimmigrants at risk of being unfairly subjected to the 3-year, 10-year and permanent bars to reentry that come with accrual of unlawful presence, which under current and longstanding policy is triggered when there is a formal determination by an immigration judge or DHS official, and clear notice provided to the nonimmigrant. The current policy provides a procedural framework and certainty in calculating when unlawful presence accrues. The proposed policy does not. It eliminates due process, and creates uncertainty and unpredictability.

The rules governing maintenance of status for F and J nonimmigrants are myriad and complex. Designated School Officers (DSOs) and Responsible/Alternative Responsible Officers

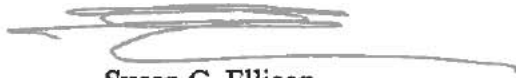
(ROs/AROs) place the utmost importance on compliance with these rules, and we work closely with international students and exchange visitors to ensure they maintain their nonimmigrant status and fulfill their government reporting obligations. Under the proposed policy, unlawful presence would begin to accrue without notice, and possibly without the individual's or the sponsoring institution's knowledge, if students or exchange visitors inadvertently, unintentionally, or unknowingly do something that could be interpreted as a violation of status. If the unlawful presence clock started at some point in the past, any window for departing the country before triggering the 3 or 10-year bar will have passed without the individual's knowledge.

We have strong concerns that this proposed policy will discourage international students, researchers and faculty from coming to the U.S. because of the risk that a minor infraction or technical violation could put them at risk of being barred to reentry for years.

In light of the foregoing, Dartmouth respectfully asks the agency to withdraw this memorandum.

Thank you for the opportunity to comment.

Sincerely,



Susan C. Ellison
Director, PDSO, RO
Office of Visa and Immigration Services
Dartmouth College